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ABSTRACT

Summarized are 43 completed or pending court cases dealing with the educational rights of handicapped children and adults. The 12 decisions are reported to have substantiated the right of handicapped children to equal protection under the law including being provided with an education and full rights of notice and due process in relation to their selection, placement, and retention in educational programs. Sources of information are said to have included attorneys, organizations, and plaintiffs. Thirty-one cases deal with the right to an education, six cases with the right to treatment, and six cases with aspects of placement. (DB)

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A CONTINUING SUMMARY OF PENDING AND COMPLETED LITIGATION REGARDING THE EDUCATION OF HANDICAPPED CHILDREN

edited by

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With increasing frequency US courts are being confronted with civil actions dealing with the denial of the civil rights of handicapped children and adults. The majority of these actions have focused on the public responsibility to provide education and treatment for the nation's handicapped citizens. The decisions reported here dealing with children have substantiated the right of handicapped children to equal protection under the law—including being provided with an education and full rights of notice and due process in relation to their selection, placement, and retention in educational programs.

Recognizing that the litigation represents an important avenue of change, The Council for Exceptional Children's State-Federal Information Clearinghouse for Exceptional Children (SFICEC), a project supported by the Bureau of Education for the Handicapped, U.S. Office of Education, has collected and organized this summary of relevant litigation. A variety of sources including attorneys, organizations, and the plaintiffs involved in the cases were contacted. The focus of the cases included in the summary is directed to education.

This summary does not include all cases filed to date. New information is continuously being received about existing new cases; and, thus there is always something too recent to be included. SFICEC will continue to acquire, summarize, and distribute this information. Those interested in more in-depth information should contact SFICEC. Each new edition of the summary contains all the information presented in earlier editions; thus, there is no necessity for readers to obtain previous editions. Readers should note that although the total size of this document is substantially smaller than past editions, the reduction has been achieved by a change in type rather than in the elimination of material.

In addition to this material, SFICEC has access to extensive information regarding law, administrative literature (rules and regulations, standards, policies), and attorneys' general opinions of the state and federal governments regarding the education of the handicapped. For further information about the project's activities and services contact:

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A. A.
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[1] Decision rendered
[2] Change of status since last edition
[3] New case this edition

RIGHT TO AN EDUCATION

MILLS v. BOARD OF EDUCATION OF DISTRICT OF COLUMBIA, 348 F. Supp. 866 (D.D.C. 1972)

In August of 1972, a landmark decision was achieved in a right to education case in the District of Columbia. In *Mills v. Board of Education of District of Columbia,* the parents and guardians of seven District of Columbia children brought a class action suit against the Board of Education of the District, the Department of Human Resources, and the Mayor for failure to provide all children with a publicly supported education.

The plaintiff children ranged in age from seven to sixteen and were alleged by the public schools to present the following types of problems that led to the denial of their opportunity for an education: slightly brain damaged, hyperactive behavior, epileptic and mentally retarded, and mentally retarded with an orthopedic handicap. Three children resided in public, residential institutions with no education program. The others lived with their families and when denied entrance to programs were placed on a waiting list for tuition grants to obtain a private educational program. However, in none of these cases were tuition grants provided.

Also at issue was the manner in which the children were denied entrance to or were excluded from public education programs. Specifically, the complaint said that "plaintiffs were so excluded without a formal determination of the basis for their exclusion and without provision for periodic review of their status. Plaintiff children merely have been labeled as behavior problems, emotionally disturbed, hyperactive." Further, it is pointed out that "the procedures by which plaintiffs are excluded or suspended from public school are arbitrary and do not conform to the due process requirements of the fifth amendment. Plaintiffs are excluded and suspended without: (a) notification as to a hearing, the nature of offense or status, any alternative or interim publicly supported education; (b) opportunity for representation, a hearing by an impartial arbiter, the presentation of witnesses; and (c) opportunity for periodic review of the necessity for continued exclusion or suspension."

A history of events that transpired between the city and the attorneys for the plaintiffs immediately prior to the filing of the suit publicly acknowledged the Board of Education's legal and moral responsibility to educate all excluded children, and although they were provided with numerous opportunities to provide services to plaintiff children, the Board failed to do so.

On December 20, 1971, the court issued a stipulated agreement and order that provided for the following:

1. The named plaintiffs were to be provided with a publicly supported education by January 3, 1972.

2. The defendants by January 3, 1972, had to provide a list showing (for every child of school age not receiving a publicly supported education because of suspension, expulsion or any other denial of placement) the name of the child's parents or guardian; the child's name, age, address, and telephone number; the date that services were officially denied; a breakdown of the list on the basis of the "alleged casual characteristics for such non-attendance;" and finally, the total number of such children.

3. By January 3, the defendants were also to initiate efforts to identify all other members of the class not previously known. The defendants were to provide the plaintiffs' attorneys with the names, addresses, and telephone numbers of the additionally identified children by February 1, 1972.

4. The plaintiffs and defendants were to consider the selection of a master to deal with special questions arising out of this order.

On August 1, 1972, Judge Waddy issued a Memorandum, Opinion, Judgment and Decree on this case which in essence supported all arguments brought by the plaintiffs. This decision is particularly significant since it applies not to a single category of handicapped children, but to all handicapped children.

At the outset, the opinion contained a declaration of the constitutional right of all children regardless of any exceptional condition or handicap to a publicly supported education. A second declaration stated that the defendants' rules, policies, and practices which exclude children without provision for adequate and immediate alternative educational services and the absence of prior hearing and review of placement procedures denied the plaintiffs and the class rights of due process and equal protection of the law.

In this opinion, Judge Waddy addressed a number of key points reacting to issues that are not unique to the District of Columbia but are common throughout the nation. Initially he commented on the fact that parents who do not comply with the District of Columbia compulsory school attendance law are committing a criminal offense. He said, "the court need not belabor the fact that requiring parents to see that their children attend school under pain of criminal penalties presupposes that an educational opportunity will be made available to the children . . . . Thus the board of education has an obligation to provide whatever specialized instruction that will benefit the child. By failing to provide plaintiffs and their class the publicly-supported specialized education to which they are entitled, the board of education violates the statutes and its own regulations."

The defendants claimed in response to the complaint that it would be impossible for them to afford plaintiffs the relief sought unless the Congress appropriated needed funds, or funds were diverted from other educational services for which they had been appropriated. The court responded: "The defendants are required by the Constitution of the United States, the District of Columbia Code, and their own regulations to provide a publicly-supported education for these 'exceptional' children. Their failure to fulfill this clear duty to include and retain these children in the public school system, or otherwise provide them with publicly-supported education, and their failure to afford them due process hearing and periodical review, cannot be excused by the claim that there are insufficient funds. In *Goldberg v. Kelly,* 397 U.S. 254 (1969) the Supreme Court, in a case that involved the right of a welfare recipient to a hearing before termination of his benefits, held that Constitutional rights must be afforded citizens despite the greater expense involved . . . . Similarly the District of Columbia's interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources. If sufficient funds are not available to finance all of the services and programs that are needed and desirable in the system then the available funds must be expended equitably in such a manner that no child is entirely excluded from a publicly-supported education consistent with his needs and ability to

benefit therefrom. The inadequacies of the District of Columbia Public School System, whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child."

Regarding the appointment of a master the court commented, "Despite the defendants' failure to abide by the provisions of the Court's previous orders in this case and despite the defendants' continuing failure to provide an education for these children, the Court is reluctant to arrogate to itself the responsibility of administering this or any other aspect of the public school system of the District of Columbia through the vehicle of a special master. Nevertheless, inaction or delay on the part of the defendants, or failure by the defendants to implement the judgment and decree herein within the time specified therein will result in the immediate appointment of a special master to oversee and direct such implementation under the direction of this Court."

Specifically, the judgment contained the following:

1. "That no child eligible for a publicly-supported education in the District of Columbia public schools shall be excluded from a regular public school assignment by a Rule, Policy or Practice of the Board of Education of the District of Columbia or its agents unless such child is provided (a) adequate alternative educational services suited to the child's needs, which may include special education or tuition grants, and (b) a constitutionally adequate prior hearing and periodic review of the child's status, progress, and the adequacy of any educational alternative."

2. An enjoiner to prevent the maintenance, enforcement or continuing effect of any rules, policies and practices which violate the conditions set in one (above).

3. Every school age child residing in the District of Columbia shall be provided ". . . a free and suitable publicly-supported education regardless of the degree of the child's mental, physical or emotional disability or impairment . . ." within thirty days of the order.

4. Children may not be suspended from school for disciplinary reasons for more than two days without a hearing and provision for his education during the suspension.

5. Within 25 days of the order, the defendants shall present to the court a list of every additionally identified child with data about his family, residence, educational status, and a list of the reasons for non-attendance.

6. Within 20 days of the order individual placement programs including suitable educational placements and compensatory education programs for each child are to be submitted to the court.

7. Within 45 days of the order, a comprehensive plan providing for the identification, notification, assessment, and placement of the children will be submitted to the court. The plan will also contain information about the curriculum, educational objectives, and personnel qualifications.

8. Within 45 days of the order, a progress report must be submitted to the court.

9. Precise directions as to the provision of notice and due process including the conduct of hearings.

Finally, Judge Waddy retained jurisdiction in the action "to allow for implementation, modification and enforcement of this Judgment and Decree as may be required."

PENNSYLVANIA ASSOCIATION FOR RETARDED CHILDREN v. COMMONWEALTH OF PENNSYLVANIA, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972).

In January, 1971, the Pennsylvania Association for Retarded Children (P.A.R.C.) brought suit against Pennsylvania for the state's failure to provide all retarded children access to a free public education. In addition to P.A.R.C., the plaintiffs included fourteen mentally retarded children of school age who were representing themselves and "all others similarly situated," i.e. all other retarded children in the state. The defendants included the state secretaries of education and public welfare, the state board of education, and thirteen named school districts, representing the class of all of Pennsylvania's school districts.

The suit, heard by a three-judge panel in the Eastern District Court of Pennsylvania, specifically questioned public policy as expressed in law, policies, and practices which excluded, postponed, or denied free access to public education opportunities to school age mentally retarded children who could benefit from such education.

Expert witnesses presented testimony focusing on the following major points:

1. The provision of systematic education programs to mentally retarded children will produce learning.

2. Education cannot be defined solely as the provision of academic experiences to children. Rather, education must be seen as a continuous process by which individuals learn to cope and function within their environment. Thus, for children to learn to clothe and feed themselves is a legitimate outcome achievable through an educational program.

3. The earlier these children are provided with educational experiences, the greater the amount of learning that can be predicted.

A June, 1971 stipulation and order and an October, 1971 injunction, consent agreement, and order resolved the suit. The June stipulation focused on the provision of due process rights to children who are or are thought to be mentally retarded. The decree stated specifically that no such child could be denied admission to a public school program or have his educational status changed without first

being accorded notice and the opportunity of a due process hearing. "Change in educational status" has been defined as "assignment or re-assignment, based on the fact that the child is mentally retarded or thought to be mentally retarded, to one of the following educational assignments: regular education, special education, or to no assignment, or from one type of special education to another." The full due process procedure from notifying parents that their child is being considered for a change in educational status to the completion of a formal hearing was detailed in the June decree. All of the due process procedures went into effect on June 18, 1971.

The October decrees provided that the state could not apply any law which would postpone, terminate, or deny mentally retarded children access to a publicly-supported education, including a public school program, tuition or tuition maintenance, and homebound instruction. By October, 1971, the plaintiff children were to have been reevaluated and placed in programs, and by September, 1972, all retarded children between the ages of six and twenty-one must be provided a publicly-supported education.

Local districts providing preschool education to any children are required to provide the same for mentally retarded children. The decree also stated that it was most desirable to educate these children in a program most like that provided to non-handicapped children. Further requirements include the assignment of supervision of educational programs in institutions to the State Department of Education, the automatic re-evaluation of all children placed on homebound instruction every three months, and a schedule the state must follow that will result in the placement of all retarded children in programs by September 1, 1972. Finally, two masters or experts were appointed by the court to oversee the development of plans to meet the requirements of the order and agreement.

The June and October decrees were formally finalized by the court on May 5, 1972.

LEBANKS v. SPEARS, Civil No. 71-2897 (E.D. La. April 24, 1973)

Eight black children classified as mentally retarded have brought suit against the Orleans Parish (New Orleans) School Board and the superintendent of schools on the basis of the following alleged practices:

1. Failure to provide any "education or instruction" to some of the children on a lengthy waiting list for special education programs, and also denial of educational opportunities to other retarded children excluded from school and not maintained on any list for readmittance.

2. Maintenance of a policy and practice of not placing children beyond the age of 13 in special education programs.

3. The unequal opportunity for an education provided to all children who are classified as mentally retarded; unequal opportunity between children classified as mentally retarded and normal; and unequal opportunity between black and white mentally retarded children.

4. Failure ". . . to advise retarded children of a right to a fair and impartial hearing or to accord them such a hearing with respect to the decision classifying them as 'mentally retarded,' the decision excluding them from attending regular classes, and the decision excluding them from attending schools geared to their special needs."

5. Classification of certain children as mentally retarded is done arbitrarily and without standards or "valid reasons." It is further alleged that the tests and procedures used in the classification process discriminate against black children.

6. The failure to re-evaluate children classified as retarded to determine if a change in their educational status is needed.

The attorneys for the plaintiffs in summary indicate that many of the alleged practices of the parish* violate the equal protection and due process provisions of the fourteenth amendment. They further state the "continued deprivation (of education) will render each plaintiff and member of the class functionally useless in our society; each day leaves them further behind their more fortunate peers."

The relief originally sought by the plaintiffs includes the following:

1. A $20,000.00 damage award for each plaintiff;

2. Preliminary and permanent injunction to prevent classification of the plaintiffs and their class as mentally retarded through use of procedures and standards that are arbitrary, capricious, and biased; the exclusion of the plaintiffs and their class from the opportunity to receive education designed to meet their needs; discrimination "in the allocation of opportunities for special education, between plaintiffs, and other black retarded children, and white retarded children," the classification of plaintiffs and their class as retarded and their exclusion from school or special education classes without a provision of a full, fair, and adequate hearing which meets the requirements of due process of law."

This case never came to trial since the defendants agreed to a consent order meeting the majority of the suit's demands proposed April 24, 1973 and made effective to May 31. Among its features are the following:

1. All children not presently served by public schools who are or are suspected of being retarded "shall be given (a) evaluation and an educational plan, and periodic review and (b) provision of a free public program of education and training appropriate to his age and mental status." The agreement established specific steps which must be taken to inform the community about the rights of the retarded children to an education.

2. The parent or guardian of any child who suspects the child is or may be retarded shall have the right to (a) hearing evaluation and educational plan and periodic review and (b) provision of a free public program and training appropriate to his age and mental status . . ."

3. "No child in a regular school class shall be referred by the schools for evaluation for possible retardation, labeled as retarded, recommended for special education placement, placed in special classes or excluded . . . without (a) evaluation and development of a special

education plan and periodic review and provision of a free public program of education and training appropriate to his age and mental status."

4. All evaluations and determinations of appropriate programs of education shall be made under the presumption that placement in a regular public school class with appropriate support services is preferable to placement in a special class. Similarly special class placement is preferable to a community training facility. Last in order of perference is a residential institution.

5. Perhaps the most unique element of this decision and one which may be repeated in other cases is that education and training opportunities must be made available to residents "Over twenty-one (21) years of age who were not provided educational services when children . . ."

6. Establishes specific provisions governing the movement, placement, and review of children in appropriate programs of appropriate education regardless of the agency providing the programs.

7. Establishes specific procedures for the suspension of mentally retarded children who present disciplinary problems to the schools that limit the frequency and duration of the suspension and govern the manner in which subsequent placements are to be made and reviewed.

The court in approving the agreement has specified that compliance will occur under the continuing supervision of the court.

The claim for money damages was dropped by the plaintiffs in the course of developing the agreement.

*Parish is the Louisiana term for county.

CATHOLIC SOCIAL SERVICES, INC. v. BOARD OF EDUCATION, administrative proceeding before the Delaware State Board of Education (filed August 24, 1971).

Catholic Social Services of Delaware as part of its responsibilities places and supervises dependent children in foster homes. In the process of trying to obtain educational services for handicapped children, the agency found ". . . the special education facilities in Delaware totally inadequate."

The four children named included:

Jimmy, age 10, a child of average intelligence who has had emotional and behavioral problems which from the beginning of his school career, indicated a need for special education. Although special education program placement was recommended on two separate occasions, the lack of programs available prevented enrollment.

Debbie, age 13, has been diagnosed as a seriously visually handicapped child of normal intelligence who, because of her handicap, cannot learn normally. She has had a limited opportunity to participate in a special education program, but as of September, 1971, none was available.

Johnnie, age 13, has for years demonstrated disruptive behavior in school which led, because of his teachers' inability to "cope" with him, to a recommendation for placement in an educational program with a small student-teacher ratio, possibly in a class of "emotionally complex children." Until the time of the suit, he had not been able to receive such training.

Adrian, age 16, has a long history of psychiatric disability which prevented him from receiving public education. Following the abortive attempts of his mother to enroll him in school, he was ultimately placed in a state residential facility for emotionally disturbed children. This placement was made without psychological testing and with no opportunity for a hearing to determine whether there were adequate school facilities available for him. Approximately one year later he was brought to the Delaware Family Court on the charge of being "uncontrolled," and after no judgment as to his guilt or innocence, he was returned to the residential school on probationary status. If his behavior did not improve, as judged by the staff, he could later be committed to the State School for Delinquent Children. In July, 1970, the latter transfer was made without Adrian being represented by counsel or being advised of this right. Since that time, Adrian has received "some educational service . . . but little or no specific training."

The complaint quotes the Constitution and laws of Delaware that guarantees all children the right to an education. Delaware Code specifies that "The State Board of Education and the local school board shall provide and maintain, under appropriate regulations, special classes and facilities wherever possible to meet the need of all handicapped, gifted and talented children recommended for special education or training who come from any geographic area." Further, the code defines handicapped children as those children "between the chronological ages of four and twenty-one who are physically handicapped or maladjusted or mentally handicapped."

Because the respondents (Board of Education and others named in the complaint) have failed to provide the legally guaranteed education to the named children, the complaint urges that the respondents:

1. Declare that the petitioners have been deprived of rightful educational facilities and opportunities.

2. Provide special educational facilities for the named petitioners.

3. Immediately conduct a full and complete investigation into the public school system of Delaware to determine the number of youths being deprived of special educational facilities and develop recommendations for the implementation of a program of special education for those children.

4. Conduct a full hearing allowing petitioners to subpoena and cross-examine witnesses and allow pre-hearing discovery including interrogatories.

5. Provide compensatory special education for petitioners for the years they were denied an education.

The four named children were placed in education programs prior to the taking of formal legal action.

REID v. BOARD OF EDUCATION OF THE CITY OF NEW YORK, 453 F. 2d. 238 (2d Cir. 1971).
REID v. BOARD OF EDUCATION OF THE CITY OF NEW YORK, pending Administrative Procedure Before the State Commissioner of Education, argued January 16, 1973.

This class action was originally brought in federal court to prevent the New York Board of Education from denying *"brain-injured"* children adequate and equal educational opportunities. Plaintiffs alleged that undue delays in screening and placing these children prevented them from receiving free education in appropriate special classes, thus infringing upon their state statutory and constitutional rights, guarantees of equal protection and due process under the fourteenth amendment.

In this 1971 case it was alleged that over 400 children in New York City were, on the basis of a preliminary diagnosis, identified as brain damaged, but could not receive an appropriate educational placement until they participated in final screening. It would take two years to determine the eligibility of all these children. An additional group of 200 children were found eligible but were awaiting special class placement.

The plaintiffs further alleged that the deprivation of the constitutional right to a free public education and due process operated to severely injure the plaintiffs and other members of their class by placing them generally in regular classes which constituted no more than custodial care for these children who were in need of special attention and instruction. In addition, providing the plaintiffs with one or two hours per week of home instruction is equally inadequate. It was further argued that if immediate relief was not forthcoming all members of the class would be irreparably injured because every day spent either in a regular school class or at home delayed the start of special instruction.

On June 22, 1971, Judge Metzner, of the U.S. District Court for the Southern District of New York, denied the motion for a preliminary injunction and granted the defendants' motion to dismiss. The Court applied the *abstention doctrine*, reasoning that since there was no charge of deliberate discrimination, this was a case where the State Court could provide an adequate remedy and where resort to the federal courts was unnecessary.

On appeal, the Second Circuit Court of Appeals, ruling on the District Court order, on December 14, 1971 decided that federal jurisdiction should have been retained pending a determination of the state's claims in the New York State Courts.

In January 1972, a class action administrative hearing was held before the New York State Commissioner of Education in accordance with the opinions of the United States Court of Appeals for the second circuit of December 14, 1971 and January 13, 1972. "The order directed the United States District Court for the Southern District of New York to abstain from declining those claims of plaintiffs which were based on the United States Constitution pending a determination by New York State's authorities of relevant but as yet unanswered questions of state law."

The substance of the new complaint submitted to the commissioner concerns the alleged failure of the respondents (the New York City Board of Education) to "fulfill their obligation to provide petitioners who represent all handicapped children, with suitable education services, facilities and/or programs in either a private or public school setting as mandated by . . ." the New York Constitution and education laws.

Petitioners in this action are nine school age children with learning disabilities attributed to brain injury and/or emotional disturbance although two children also possess orthopedic handicaps. The class they represent is estimated to be 20,000 children. An additional petitioner is the New York Association for Brain Injured Children, a state-wide organization involved in promoting educational, medical, recreational programs and facilities, social research, and public education regarding the needs of brain injured children.

The named children range in age from seven to 12 and have school histories including misplacement, medical or other suspension from school with no provision for continuing instruction, multiple screening and evaluation sessions, miscommunication between the parents and school personnel, home instruction ranging from one to three hours a week, and long-term assignment to waiting lists for placement in public special education programs.

In addition to the board of education of the city of New York, the respondents also include Harvey Scribner, Chancellor of the New York School District.

Specifically, it is alleged that respondents' violation of the law include ". . . failure to do so within a reasonable time in order to meet the child's educational needs; failure to place a handicapped child or failure to find a suitable placement; the unavailability of placements in violation of the mandate that education services, facilities and/or programs must be provided for handicapped children; suspension of handicapped children from classes without adequate notice or alternatives; unreasonable lapses of time between placements or between placements and evaluation; failure to endeavor to secure public or private school for a handicapped child placing the burden on parents to search for private school placements, provision of entirely unsuitable home instruction." Finally, it is alleged that petitioners and their class have been caused serious and irreparable harm.

The petition also contains the following arguments:

1. The failure of the respondents to provide for the suitable education of the petitioners and their class and the manner in which this occurs including coercion of parents to withdraw their children from school, suspension of children without procedural safeguards and the

time delay between screening, diagnosis, and placement places the burden of finding an education for their children on parents rather than the schools.

2. It is maintained by respondents that for the 20,000 handicapped children included in the class, placements are not made because ". . . they have not developed special classes which are suitable to the need of those children" or they ". . . have classes suitable for that particular handicap but do not have room in them." It is also pointed out that 65,000 children are presently enrolled in city special education programs.

3. The home instruction program offered is not a suitable educational service because it was initially designed for children who needed physical isolation and not for children who require specialized learning situations including special personnel, equipment, and material. As stated in the petition "the lack of intensity of home instruction, the fact it is only offered a few hours a week to a child who needs a full day in the classroom so that he can learn and relearn apply his learning daily and hourly, makes it dramatically unsuitable."

The petition seeks the following:

1. ". . . immediate relief in the nature of suitable education services, facilities and/or programs beginning fall 1972" for all named children.

2. Similarly, all children in the class must be provided ". . . with suitable education services, facilities, and/or programs in a school and classroom environment beginning with the fall 1972 semester."

3. The relief requested in 1 and 2 may be provided ". . . within a public school setting or by contracting with a private institution within the vicinity of the child's home for such services, facilities and/or programs pursuant . . ." to state law.

4. The diagnosis and evaluation of ". . . all children suspected of being handicapped in a prompt and timely manner."

5. All children henceforth found to be handicapped be provided with suitable education services, facilities, and/or programs in a school and classroom environment.

6. ". . . provide all children now receiving home instruction with suitable education services, facilities, and/or programs in a classroom and school environment."

7. An order requiring ". . . the respondents to submit a plan to the Commissioner, subject to this modification, approval, and continual supervision, to ensure compliance with the above orders . . . to include a complete listing of available services, facilities and/or programs, the number of children enrolled and attending public school special classes and classes in private institutions with which the respondents have contracted, the number of children on waiting lists for special classes and private school classes, an approximation of the number of children annually who may need special classes, the number of children in the screening units, the number of children on waiting lists or probably in need of screening, a projection in detail of the number of new classes and class spaces that must be made available for respondents to provide the relief herein granted; and further order that the plan specify the detailed timetable for screening, diagnosis, classification, and placement by respondents of petitioners and the class herein represented; and further order the inclusion in the plan of any other items not herein listed."

This proceeding was heard before the New York Commissioner of Education on January 16, 1973. As a result of the petitioner's allegation, New York State Commissioner of Education, Ewald B. Nyquist, ordered that an investigation of the school district be conducted. The investigation which occurred in June and July, 1973 substantiated the charge that there are "numerous children residing within the respondent district whose educational needs are not being adequately served" in accordance with state law. It also disclosed the existence of a "Medical Discharge Register" which lists children who had been suspended and were not receiving educational services. The Commissioner said in a November 26 order that children with handicaps and discipline problems who were placed on that list in lieu of appropriate education programs may never receive programs to meet their needs.

In the same order the Commissioner reported the following deficiencies in the New York City Public Schools:

"Undue delays in examinations and diagnostic procedures; Failures to examine and diagnose handicaps; Failures to place handicapped children in suitable programs; Children placed on home instruction in violation of thepurpose of home instruction; Children placed on home instruction who did not receive the required hours of personal instruction in accordance with the regulations of the Commissioner of Education; Handicapped children expelled from public school education for medical reasons when such medical reasons did not preclude benefits from educational settings; Incomplete or conflicting census data on the number of handicapped children residing in New York City; Inadequate means of informing parents of the processes related to special education services, and inadequate plans for parent involvement in effective planning and decisionmaking regarding their children; Suspension of handicapped children from classes without adequate notice or provisions for alternate educational services; Failures to provide available space and facilities for programs."

To rectify these inadequacies the Commissioner ordered that:

1. The "Medical Discharge Register" to be discontinued, and home instruction be used only in accordance with existing statutes. A list of students receiving home instruction and the reasons for the provisions of such programs must be submitted to the Commissioner.

2. "All students who have been diagnosed as handicapped be placed immediately in appropriate public school classes or, if public school classes are not available, in private schools under contract in accordance with" state.

3. That plans for the following be submitted to the Commissioner by February 1, 1974: (a) eliminating waiting lists for diagnosis and placement; (b) regionalizing evaluation of the handicapped; (c) meeting the needs of the handicapped in secondary schools; and (d) notifying parents of available services and personnel.

Finally, the Commissioner retained jurisdiction of the petitioner's appeal.

DOE v. BOARD OF SCHOOL DIRECTORS, Civil No. 377-770 (Cir. Ct. Milwaukee County, 1970)

The plaintiffs in this class action are represented by John Doe, a 14 year old trainable mentally retarded student. The suit against the Milwaukee Board of School Directors focused on the fact that although John Doe was tested by a school board psychologist who determined that he was mentally retarded and in need of placement in a class for the trainable mentally retarded, he was put on a waiting list for the program. It is alleged that this is a violation of the equal protection clause of the 14th Amendment of the United States Constitution.

Plaintiffs argued that this violation occurred on two counts. First, John Doe, as a school age resident of the city of Milwaukee, is guaranteed an education by the Wisconsin Constitution. It is pointed out that public education is provided to "the great bulk of Milwaukee children . . . without requiring them to spend varying and indefinite amounts of time on waiting lists waiting for an education."

The second alleged violation occurred because, under the law, the school directors are required "to establish schools sufficient to accommodate children of school age with various listed handicaps, including children with mental disabilities." It is further argued that at the same time of the complaint 400 trainable mentally retarded children were attending such classes. Thus, by denying the plaintiff participation in the program, the defendants are denying them equal protection of the law.

The plaintiffs sought:

(1) A temporary order requiring immediate enrollment of plaintiffs in an appropriate class for trainable mentally retarded children and (2) An order enjoining the defendants from maintaining a waiting list that denies public education to those requiring special education.

A temporary injunction was ordered and the public schools were required to admit the plaintiffs into the program for trainable mentally retarded children with all reasonable speed which was defined at 15 days. This order delivered in 1970 is still in effect.

MARLEGA v. MILWAUKEE BOARD OF SCHOOL DIRECTORS, Civil Action No. 70-C-8 (E.D. Wis. September 17, 1970)

This case, completed in 1970, was a class action suit with Douglas Marlega as the named plaintiff. He brought suit against the board of school directors of the public schools of Milwaukee on the basis of denial of constitutionally guaranteed rights of notice and due process.

At issue was the exclusion of Marlega from public school attendance because of alleged medical reasons involving hyperactivity ". . . without affording the parents or guardians an opportunity to contest the validity of the exclusion determination." Marlega, of average intelligence, was completely excluded from February 16, 1968, to October 7, 1968. His parents were not given justification for the exclusion, nor were they given any opportunity for a due process hearing. Throughout the period of exclusion, ". . . no alternative public schooling is furnished on a predictable basis" and "no periodic review of the condition of excluded students is apparently made nor is home instruction apparently provided on a regular basis."

The following was sought by the plaintiff:

1. a temporary restraining order to reinstate Marlega and his class in school;
2. an order to defendants to provide the plaintiffs a due process hearing; and
3. an order to prevent the board of school directors of Milwaukee from excluding any children from school for medical reasons without first providing for a due process hearing except in emergency situations.

A temporary restraining order was awarded on January 14, 1970. On March 16, 1970, the Court ordered that no child could be excluded from a free public education on a full-time basis without a due process hearing. The school directors submitted to the court a proposed plan for the handling of all medically excluded children which was approved on September 17, 1970.

WOLF v. STATE LEGISLATURE, Civil No. 182464 (Third Jud. Dist. Ct., Utah, Jan. 8, 1969)

A 1969 ruling in the Third Judicial Court of Utah guaranteed the right to an education at public expense to all children in the state. This action was brought on behalf of two trainable mentally retarded children who were the responsibility of the State Department of Welfare. The children were not being provided with suitable education. The judge, in his opinion, stated that the framers of the Utah constitution believed "in a free and equal education for all children administered under the Department of Education." He further wrote that "the plaintiff children must be provided a free and equal education within the school districts of which they are residents, and the state agency which is solely responsible for providing the plaintiff children with a free and public education is the State Board of Education."

MARYLAND ASSOCIATION FOR RETARDED CHILDREN v. STATE OF MARYLAND, Civil No. 72-733–M (D.C. Md., filed July 19, 1972)

A class action suit is being brought by the Maryland Association for Retarded Children and 14 mentally retarded children against the state of Maryland and its state board of education, state superintendent of education, secretary of health and mental hygiene, director of the mental retardation administration, and local boards of education for their failure to provide retarded or otherwise handicapped children with an equal and free public education.

The 14 plaintiff children range from those classified as severely retarded to the educable. The majority of the children, whether living at home or in an institution, are not receiving an appropriate education with some children being denied any education to those inappropriately placed in regular education programs. For example, two educable children, residing in Baltimore city, have been placed and retained in regular kindergarten programs because they are not yet eight years old though their need for a special class placement has been recognized.

The complaint emphasizes the importance of providing all persons with an education that will enable them to become good citizens, achieve to the full extent of their abilities, prepare for later training, and adjust normally to their environment. It is further argued that "the opportunity of an education, where the state has undertaken to provide it, is a right that must be made available to all on equal terms."

The contention of the plaintiffs is indicated in the following:

"There are many thousands of retarded and otherwise handicapped school-age children (children under age 21) in the state of Maryland. Defendants deny many of these children (including each of the individual plaintiff children herein) free publicly-supported educational programs suited to their needs, and for transportation in connection therewith.

"More specifically, defendants deny such educational programs to many children who are retarded, particularly to those who are profoundly or severely retarded, or who are multiply disabled; or who are not ambulatory, toilet trained, verbal, or sufficiently well behaved; or who do not meet requirements as to age not imposed on either normal or handicapped children comparably situated. As a result of their exclusion from public education, the plaintiff children's class (including plaintiffs) must either (a) remain at home without any educational programs; or (b) attend nonpublic educational facilities partly or wholly paid for by their parents; or (c) attend 'day care' programs that are not required to provide structured, organized, professionally run programs of education; or (d) seek placement in public or nonpublic residential facilities, partly or wholly paid for by their parents, which do not provide suitable educational programs for many of these children.

"Like children for whom defendants provide suitable publicly-supported educational programs, including other retarded and otherwise handicapped children, the plaintiff children's class can benefit from suitable educational programs. The defendants' failure to provide these children with publicly-supported educational programs suited to their needs is arbitrary, capricious, and invidiously discriminatory and

serves no valid state interest. The denial of such programs violated the plaintiffs' rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the Constitution of the United States."

The plaintiffs allege that the state's tuition assistance program provides insufficient funds to educate these children and thus parents are forced to use their own resources. "Thus, defendants have conditioned the education of these children on their parents' ability to pay. That action is arbitrary, capricious, and invidiously discriminatory, serves no valid state interest, and violates the said plaintiffs rights under the due process and equal protection clauses of the Fourteenth Amendment . . . ."

Another allegation is that the state when making placement decisions does not provide for notice and procedural due process.

The plaintiffs are seeking declaratory and injunctive relief to require the state to make free education available for all handicapped or retarded children, regardless of the nature and severity of their handicaps.

On June 1, 1973, oral arguments were heard on a large number of motions by the state and local defendants to dismiss the suit on various grounds. The court refused to dismiss the suit.

As a result of a pre-trial conference held August 10, 1973, the defendants agreed to provide educational opportunity for a number of named plaintiff children beginning in September, 1973. This agreement has the effect of a preliminary injunction and will require programming to be provided for these children pending the outcome of the full trial.

On September 7, 1973, the court "abstained" with respect to the right-to-education issues in the case, requiring the plaintiffs to obtain a state court determination of their right to an education under State law. The federal court will proceed with the plaintiffs' due process claims and claims that defendants have used funds under the Elementary and Secondary Education Act improperly. On September 27, 1973, the plaintiffs filed a companion case in Maryland state court to obtain a determination of the state law issues. (*M.A.R.C. v. State of Maryland*, Circuit Court for Baltimore County (Equity), Docket 100, File 77676, Folio 182.)

NORTH CAROLINA ASSOCIATION FOR RETARDED CHILDREN, INC. v. THE STATE OF NORTH CAROLINA, Civil No. 3050 (E.D. N.C. filed May 19, 1972)

On May 19, 1972, a suit was introduced in the Raleigh Division of the Eastern District Court of North Carolina by the North Carolina Association for Retarded Children, Inc. and thirteen mentally retarded children against the state of North Carolina, various state agencies and their department heads, a city school district, and a county school district for failure to provide free public education for all of the state's estimated 75,000 mentally retarded children.

The class action suit names thirteen severely and moderately mentally retarded children as plaintiffs. The children's histories include never having been in public school, having been excluded from public school, having been delayed entrance into public school programs, or in some cases having received an education through private programs at their parents' expense. Plaintiff children who had been receiving a public education were excluded because of alleged lack of facilities or failure of the children to meet certain behavioral criteria such as toilet training. In summary, the suit is being brought on behalf of "residents of North Carolina, six years of age and over, who are eligible for free public education but who have by the defendants (1) been excluded, or (2) been excused from attendance at public schools, or (3) had their admission postponed, or (4) otherwise have been refused free access to public education or training commensurate with their capabilities because they are retarded."

The defendants include the state, the state superintendent of public education, the department of public education, the state board of education, the department and the secretary of the department of human resources, the commissioner and the state board and the state department of mental health, the treasurer and the department of the state treasurer, the state disbursing officer and the controller of the state board of education, the Wake County board of county commissioners. The two school districts are named as typical of all the state's local city or county education agencies. The board of county commissioners is also named as representative of all of the state's county boards that "have the authority and duty to levy taxes for the support of the schools."

Plaintiffs' attorneys quote the North Carolina constitution which provides that "equal opportunities shall be provided for all students for free public school education." Further support for the legal obligations of the state to provide for the education of the mentally retarded comes from the following section of a 1967 North Carolina attorney's general opinion:

> It is unconstitutional and invalid, therefore, to operate the public school system in a discriminatory manner as against the mentally retarded child and to allocate funds to the disadvantage of the mentally retarded child. Often a mentally retarded child develops fair skills and abilities and becomes a useful citizen of the state but in order to do this, the mentally retarded child must have his or her chance.

The complaint specifically alleges that the school exclusion laws (G.S. Sec. 115-165) deprive the plaintiffs of the equal protection of the law in violation of the 14th Amendment of the U.S. Constitution in the following manner:

1. Discriminates between handicapped and non-handicapped children by allowing a county or city superintendent of schools to decide that a "Child cannot substantially profit from the instructions given in the public school as now constituted and as such discriminates against the severely afflicted by mental, emotional or physical incapacity children in favor of those children who are not so afflicted in that these unfortunate children are deprived of any and all educational training whereas the children who do not fall in this classification or category obtain complete free public education."

2. "Arbitrarily and capriciously and for no adequate reason" denies mentally retarded children educational opportunities to become self-sufficient and contributing citizens as guaranteed by the North Carolina constitution and laws and further "subjects them to jeopardy of liberty and even of life."

3. Denial of the plaintiff children from attendance in public schools imposes the unfair criterion of family wealth as the determining factor of their receiving an education. In effect, children from poor families are unable to obtain private education as can children from financially able families.

4. Plaintiffs' parents, although paying taxes for the support of public schools, are unable to have their children admitted and thus in order to obtain an education for them must pay additional funds.

Other counts included in the complaint are as follows:

1. In the implementation of the school attendance law plaintiffs are denied procedural due process of law as guaranteed in the 14th amendment of the U. S. Constitution including provisions for notice, hearing, and cross examination.

2. The North Carolina Statute requiring parents to send their children to school contains an exception which relieves parents of children "afflicted by mental, emotional, or physical incapacities so as to make it unlikely that such child could substantially profit by instruction given in the public schools" from this responsibility. Plaintiffs argue however that this statute which is "to forgive what otherwise would be violations of compulsory attendance requirements and to preserve to the parents the decision of whether the child shall attend school" is in fact used to "mandate non-attendance contrary to parents' wishes and thus justify the exclusion of retarded children from the public schools "in violation of their constitutional rights."

3. The defendants have ignored the law that all children are eligible for public school enrollment at age six and have excluded retarded children until they are older.

4. In addition to preventing the enrollment of plaintiff children in public schools, the defendants also are alleged to exclude, excuse, and postpone admission to public schools and to provide education for children at state schools, hospitals, institutions, and other facilities for the mentally retarded.

The suit seeks the following remedies:

1. Declaration that all relevant statutes, policies, procedures, and practices are unconstitutional.

2. Permanently enjoin the defendants from the practices described as well as "giving differential treatment concerning attendance at school to any retarded child."

3. A permanent injunction requiring that the defendants operate educational programs for the retarded in schools, institutions, and hospitals, and, if necessary, at home with all costs being charged to the responsible public agency.

4. A permanent mandatory injunction directing the defendants to provide compensatory years of education to each retarded person who has been excluded, excused, or otherwise denied the right to attend school while of school age and further enjoin the defendants to give notice of the judgment herein to the parents or guardians of each such child.

5. Provision to the plaintiffs the cost of the suit including "reasonable counsel fees."

On July 31, 1972, an expanded complaint was filed naming in addition to the North Carolina Association for Retarded Children, 22 plaintiff children. The new complaint joins the original North Carolina Association for Retarded Children suit with *Crystal Rene Hamilton v. Dr. J. Iverson Riddle, Superintendent of Western Carolina Center, et. al.* (Civil Action No. 72-86). The additional plaintiffs include children whose histories permitted the addition of the following allegations regarding the state's failure to provide for their education: ". . . who have by the defendants . . . (5) been denied the right of free homebound instruction or (6) been denied the right of tuition or costs reimbursement in private schools or institutions or (7) been denied the right of free education, training or habilitation in institutions for mentally retarded operated by the State of North Carolina."

A further distinction is the allegation that there are state statutes which operate to grant "aid to the mentally retarded children below the age of six years in non-profit private facilities for retarded children and excluding such aid to mentally retarded children above six years attending the same type of institutions."

It is further alleged that the defendants further "failed to provide for appropriate free education, training and habilitation of the plaintiffs in their homes after excluding the plaintiffs from free education and training in the public schools and thus condition the plaintiffs education in the homes upon the impermissible criteria of wealth, denying training, education, and habilitation to those children whose parents are poor."

In the expanded suit an additional count has been introduced that focuses on the state institutions for the mentally retarded. Specifically, it is alleged that the centers for the retarded are "warehouse institutions which, because of their atmosphere of psychological and physical deprivation, the institutions are wholly incapable of furnishing habilitation to the mentally retarded and are conducive only to the deterioration and the debilitation of the residents." It is also charged that the institutions are understaffed, overcrowded, unsafe and do not provide residents with "education, training, habilitation, and guidance as will enable them to develop their ability and maximum potential."

The plaintiffs are seeking in addition to the remedies originally sought the granting of a permanent injunction:

1. to prevent the defendants from denying the right of any retarded child of six years and older to free homebound instruction;

2. to prevent the defendants from denying the reimbursement of tuition and costs to the parents of retarded children in private schools or facilities;

3. to direct the defendants to establish publicly-supported training programs and centers for all mentally retarded children without discrimination;

4. to direct the defendants "to provide such education, training and habilitation outside the public schools of the district or in special institutions or by providing for teaching of the child in the home if it is not feasible to form a special class in any district or provide any retarded child with education in the public schools of the district . . . ."

The case is presently in the discovery process which is scheduled for completion fall, 1973. The three judge court has informally deferred ruling on a motion to dismiss filed by the defendants pending a full hearing which has been scheduled for the early fall.

HAMILTON v. RIDDLE, Civil No. 72-86 (W.D.N.C., filed May 5, 1972)

This case was filed on May 5, 1972, in the Charlotte Division of the Western District Court of North Carolina as a class action on behalf of all school age mentally retarded children in North Carolina. Defendants include the superintendent of the Western Carolina Center, a state institution for the mentally retarded; the secretary of the North Carolina department of human resources; the state superintendent of public instruction; and the chairman of the Gaston County board of education.

Crystal Rene Hamilton is an eight year old mentally retarded child who on November 1, 1971, when admitted to the Western Carolina Center had until that time received only nine hours of publicly-supported training. She was admitted to the Center "under the provision that she would be able to remain in said Center for a period of only six months, after which time it would be necessary for her to return to her home and be cared for by her parents; that she has been diagnosed as a mentally retarded child and needs a one-to-one ratio of care and treatment." The complaint alleges that the parents are unable to provide "this care and treatment," that the state does not have other facilities to provide the care and the Center administrator has notified Crystal's parents to take her home.

The cause of action cited in the complaint is that the state, through its board and agencies, "has failed to provide equal educational facilities for the plaintiff and has denied to her access to education and training . . ." Thus it is alleged that the plaintiff has been denied equal protection of the law and equal education facilities as "guaranteed" by the United States Constitution and the constitution and statues of North Carolina. The statutes "guarantees equal free educational opportunities for all children of the state between the ages of six and twenty-one years of age."

Also at issue is the classification scheme used by the state which "selects some students as eligible for education and some as not . . . ." Further, the complaint argues that the state's practice of making financial demands upon the parents of mentally retarded children for the care and treatment of their children ". . . is repugnant to the provision of the law and is denying equal protection to said children . . . ."

Arguing that Crystal Rene Hamilton and the members of her class have suffered and are now suffering irreparable injury, the plaintiffs are seeking the following relief:

1. A three-judge court be appointed to hear the case;

2. Enforcement of state statutes providing equal educational opportunities and declare null and void statutes that do otherwise;

3. An injunction be issued to prevent the Western Carolina Center from evicting Crystal Rene Hamilton;

4. That this action be joined with civil action No. 72-72;

5. Plaintiff costs and counsel fees.

HARRISON v. STATE OF MICHIGAN, 350 F. Supp 846 (E.D. Mich. 1972)

On May 25, 1972, the Coalition for the Civil Rights of Handicapped Persons, a non-profit corporation formed to advance the rights of handicapped children, and 12 handicapped children filed suit in the Southern Division of the United States District Court for the Eastern District of Michigan against the state of Michigan, the department of education, the department of mental health, the Detroit school board and officers, and the Wayne County intermediate school district and its officers for their failure to provide a publicly-supported education for all handicapped children of Michigan.

The suit seeks class action status and divides the plaintiff children, all of whom are alleged to have mental, behavioral, physical or emotional handicaps, into the three distinct groups:

1. Children denied entrance or excluded from a publicly-supported education;

2. Children who are state wards residing in institutions receiving no education;

3. Children placed in special programs that are alleged not to meet their learning needs.

The plaintiff children present a full range of handicapping conditions including brain damage, mild, moderate, or severe mental retardation, autism, emotional disturbance, cerebral palsy, and hearing disorders. The complaint suggests that the children named represent a class of 30,000 to 40,000 who are handicapped three times over. They are first handicapped by their inherited or acquired mental, physical, behavioral, or emotional handicap; secondly "by arbitrary and capricious processes by which the defendants identify, label, and place them, and finally by their exclusion from access to all publicly-supported education."

The complaint argues that the right of these children to an education is based on Michigan law stating that "the legislature shall maintain and support a system of free public elementary and secondary schools as defined by law." Further, Article VIII, Section 8 of the Michigan Constitution indicates that the state shall foster and support "institutions, programs, and services for the care, treatment, education, or rehabilitation of those inhabitants who are physically, mentally, or otherwise seriously handicapped."

Further, as in all of the right to education litigation, the role of education in preparing children to be productive adults and responsible citizens is emphasized and can be summarized by this quote: "No child can reasonably be expected to succeed in life if he is denied the opportunity of an education."

Of importance in this suit is that recognition is given in the complaint to a mandatory special education law effective July 1, 1972. However, since that law will not be fully implemented until the 1973-74 school year, the plaintiffs are presently being denied rights. In addition, it is pointed out that the mandatory act does not provide for compensatory education or the right to hearing and review as the educational status and/or classification of the children is altered.

The complaint seeks the following relief:

1. That the acts and practices of the defendants to exclude plaintiff children and the class they represent from an adequate publicly-supported education is a violation of due process of law and equal protection under the 14th Amendment of the U.S. Constitution.

2. That the defendants be enjoined in continuing acts and practices which prevent plaintiffs from a regular public school education without providing (a) adequate and immediate alternatives and (b) a constitutionally adequate hearing and review process.

3. That plaintiffs and all members of the class be provided with a publicly-supported education within 30 days of the entry of such an order.

4. That within 14 days of the order defendants present to the court a list which includes the name of each person presently excluded from a publicly supported education and the reason, date, and length of his expulsion, suspension, exclusion, or other type of denial.

5. That parents or legal guardian of each named person be informed within 48 hours of the submission of that report of the child's rights to a publicly-supported education and his proposed placement.

6. That within 20 days of the entry of the order all parents in Michigan be informed that all children, regardless of their handicap or alleged disability, have a right to an education and the procedures available to enroll these children in programs.

7. That constitutionally adequate hearings on behalf of a person appointed by the court be conducted for any member of the plaintiff class who is dissatisfied by the education placement.

8. That plaintiffs be provided with compensatory services to overcome the effects of wrongful past exclusion.

9. That within 30 days from the entry of the order a plan for hearing procedures regarding refusal of public school admission to any child, that reassignment of the child to a regular public school and the review of such decisions be submitted to the court.

10. That within 30 days from the entry of the order a plan for adequate hearing procedures regarding suspension or expulsion of any student from school be submitted to the court.

11. Grant other relief as necessary including payment of attorney fees.

On October 30, 1972, U.S. District Judge Charles W. Joiner issued a memorandum, opinion, and order dismissing the plaintiff's complaint. In his decision Judge Joiner recognized that prior to the passage of Public Act 198 in 1971 [a law requiring education for all children to take effect September, 1973] ". . . the state of Michigan was making little effort to educate children who are suffering from a variety of mental, behavioral, physical and emotional handicaps, many children were denied education." He further indicated that until Public Act 198, there existed serious questions as to "whether such persons were denied equal protection of the law." He then stated that "if that condition still existed this court would have no difficulty, or exercise the slightest hesitation, relying on the *Pennsylvania Association for Retarded Children v. Commonwealth of Pennsylvania*, 334 F. Supp. 1257 (E.D. Pa. 1971) and 343 F. Supp. 279 (E.D. Pa. 1972), in denying the motions to dismiss." Finally the judge pointed that the passage of the law renders the complaint moot.

In the process of rendering his opinion Judge Joiner made the following key points:

1. To provide education for some children while not providing it for others is a denial of equal protection.

2. The development of a comprehensive plan for the education of handicapped children ". . . is not the sort of problem which can be resolved by the issuance, no matter how well intended, of a judicial order."

3. "The law suit must be dismissed as to plaintiffs' denial of equal protection claim because the court finds that it could not possibly, no matter how much it might like to, do anything more to solve the equal protection problem bef proposals already being implemented under the leadership of the Michigan legislature, Michigan Public Act 198, 1971."

4. Although the complaint argued that Public Act 198 does not require a due process hearing prior to an alteration in a child's educational status ". . . it would be premature to hold that the statute will be applied in an unconstitutional fsahion . . . the court must assume that the statute will be applied in a constitutional fashion, whether it be in reference to equal protection, or in reference to due process."

5. "The most that should be done at this stage is to indicate clearly that, although the matter is at this time premature because the process of implementation is proceeding in good fashion, and because there is no way which this court could proceed with implementation faster, if it should turn out either that the act is not fully and speedily implemented and funded or that procedures do not comply with due process, judicial remedies would then be available to the injured persons."

6. In considering whether to retain jurisdiction of the 12 individual plaintiffs, the court indicated that "their case, compelling as it is, is no more compelling than that of the thousands who are to be the beneficiaries of Public Act 198." The judge continued, ". . . the court must assume that the state will act constitutionally, rather than unconstitutionally . . . ."

7. The fact that the legislature had acted to affirm the constitutional equal protection principle prior to the "cause" being presented to the court provides a situation where ". . . the executive department can face up to the problems of due process in implementing the act before the act is fully operative." Further, Judge Joiner says "had the same foresight and leadership on the part of other branches of government been evidenced in the school desegration problems, it is clear there would have been fewer controversies, less stress and probably quicker and more widespread results."

ASSOCIATION FOR MENTALLY ILL CHILDREN v. GREENBLATT, Civil No. 71-3074-J (D.C. Mass., filed Dec. 30, 1971)

This class action suit is being brought by emotionally disturbed children against officers of the Boston school system all other educational officers in school districts throughout the state, and the Massachusetts state departments of education and mental health for the alleged "arbitrary and irrational manner in which emotionally disturbed children are denied the right to an education by being classified emotionally disturbed and excluded both from the public schools and an alternative education program."

Lori Barnett, an eight year old child classified as emotionally disturbed, has never been provided with a public education by the Commonwealth. The situation has persisted even though she has sought placement in both the Boston special education program and residential placement in a state-approved school.

The suit specifically charges that as of July, 1971, a minimum of 1,371 emotionally disturbed children, determined by the Commonwealth as eligible for participation in appropriate educational programs, were denied such services. Instead they were placed and retained on a waiting list "for a substantial period of time." Although some of the children were receiving home instruction, this is not considered to be an appropriate program.

Secondly, it is alleged that the plaintiff children are denied placement in an arbitrary and irrational manner, and no standards exist on state or local levels to guide placement decision in either day or residential programs. It is argued that, in the absence of state standards, the placement of some students while denying placement to others similarly situated violates the plaintiffs' rights of due process and equal protection.

Another issue in this case concerns the allegation that the plaintiff children are denied access to appropriate educational programs without a hearing thus violating their rights to procedural due process.

Finally, it is charged that the failure to provide the plaintiff children with an education, solely because they are emotionally disturbed ". . . irrationally denies them a fundamental right to receive an education and to thereby participate meaningfully in a democratic society, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the U.S. Constitution."

Declaratory judgment is sought to declare unconstitutional excluding or denying an emotionally disturbed child from an appropriate public education program for which he is eligible without a hearing. Also sought is a judgment of unconstitutionality regarding the denial of placement to eligible emotionally disturbed children in the absence of ". . . clear and definite ascertainable standards established for admission to that program;" the refusal of placement to eligible children in programs while similarly situated children are admitted to such programs; and the denial of education to a child solely because he is emotionally disturbed. Permanent injunction is also sought to prevent the defendants frm violating plaintiffs' rights. Finally, an order is requested to require the defendants to prepare a plan detailing how the plaintiffs' rights will be fully protected and to appoint a master to monitor development and implementation of the plan.

The case is pending in the United States District Court for the District of Massachusetts.

PANITCH v. STATE OF WISCONSIN, Civil No. 72-C-461 (E.D. Wis., filed Aug. 14, 1972)

This suit is being brought against the state by Mindy Linda Panitch as representative of a class of children "who are multi-handicapped, educable children between the ages of four and twenty years, whom the state of Wisconsin through local school districts and the department of public instruction is presently excluding from, and denying to, a program of education and/or training in the public schools or in equivalent educational facilities."

The issue in this action is a Wisconsin statute and policy enabling handicapped children to attend "a special school, class or center" outside the state. When this occurs and depending upon the population of the child's residence, either the county or school district is required to pay the tuition and transportation. The policy limits the enrollment of children under this act to "public institutions." The rationale is that "constitutional and statutory limitations preclude in-state handicapped pupils attending private educational facilities and receiving the benefits of tuition. This policy maintains a consistency of treatment for out-of-state school attendees as well. Experience with the program to date has indicated that the potential costs accruing to counties in utilizing both public and private facilities would be a prohibitive factor. Similarly, the department lacks sufficient staff, resources, and authority to assess the adequacy of private school facilities."

The complaint alleges that the plaintiff and members of the class are denied equal protection of the laws since the "defendant does not, either through local school districts or the department of public instruction, provide any facility within the state to provide an education

and/or training to plaintiff and other members of the class." This violation of the laws, it is alleged, occurs even though special education programs are available outside the state.

The relief sought includes:

1. the declaration that the statute and policy referred to above are unconstitutional and invalid;

2. direction from the court to the defendant to provide to the plaintiff and other members of the class ". . . a free elementary and high school education;" and

3. all plaintiff costs.

On November 16, 1972, Judge Myron L. Gordon of the Eastern District Court of Wisconsin issued a decision and order providing initially that this suit could proceed as a class action. The plaintiff class includes ". . . all handicapped educable children between the ages of four and twenty who are residents of Wisconsin and are presently being denied, allegedly, a program of education in public schools or in equivalent educational facilities at public expense." The defendant class also includes all school districts in the state. Finally, the court ordered the parties in the action to meet and devise plans for providing notice.

In December, 1972, the state and the named representative of the school districts filed answers to the complaint. At the same time, the school district, also filed a cross complaint.

In essence the state's answer to the complaint questions whether the claims made by the plaintiff are representative of the class and whether the named school district has denied or is continuing to deny public education to the plaintiff and whether the named school district is typical of all the school districts in the state. The state further denies that no facilities are provided within the state at public expense for the "education and/or training" of the plaintiff and other members of the class. It is admitted that appropriate facilities potentially available to the plaintiffs do exist outside the state but denies that all such facilities have been made unavailable to the plaintiff and the class at public expense. The state denies that the plaintiff and the class have been or are continued to be denied equal protection of the laws as required by the 14th Amendment of the U.S. Constitution.

In presenting affirmative defenses, the state alleges that:

1. No justifiable controversy exists because "the complaint is a mere statement of unsupported legal conclusions."

2. The court should abstain "because a decision under state law might obulate the necessity of a federal constitutional determination."

3. The state has recognized the right of all handicapped children to be appropriately educated at public expense and has offered such opportunities to the plaintiff and members of the class.

4. The plaintiff is trainable, not educable, and will profit more from a training program than the academic program made available to all educably retarded and handicapped children.

5. A training program had been offered to the plaintiff's parents who would rather place the child in an out-of-state school for the visually handicapped at public expense.

6. The state does provide an equal opportunity for education and equal protection of the law to all children ". . . according to their physical and mental ability."

7. No grounds have been presented for temporary or permanent injunctive relief.

In conclusion, the state seeks a dismissal of the complaint.

The answer from the school district is essentially the same as for the state with the following exceptions.

1. No attempt was made to enroll the child in the district to educate the child.

2. Denies it is representative of all the state's school districts.

In the cross complaint against the defendants it is alleged that if the complaint is successful, that inequities will occur among the school districts in the financial responsibility for providing for the education of the plaintiff and the class.

The relief sought by the school district includes a dismissal of the complaint but also that if the complaint is successful, the statute regarding the financial responsibility for children placed in programs outside the state be declared unconstitutional as different burdens are assessed on the basis of the populations of the child's resident school district and/or county.

In December 1972 the plaintiff and her class amended their complaint to seek a three judge district court.

Additional arguments presented by the plaintiff state that the Wisconsin policy of providing education to non-handicapped and some handicapped children while denying the opportunity for an education to other handicapped children forms two classes of children where constitutionally only one can exist. It was alleged that such exclusionary practices violate the Equal Protection Clause of the Fourteenth Amendment. Furthermore, the defendants have absolutely denied the plaintiffs an "opportunity to acquire the basic minimal skills necessary for meaningful exercise of the right of speech and the right to vote on an equal basis with other citizens of Wisconsin."

A second claim for relief was added alleging a lack of due process in state actions which placed, transferred, reassigned, excluded, exempted, suspended or expelled a child. Since important rights are at stake during these situations stringent procedural due process requirements must be met.

Perhaps suggesting a new type of specific relief that will characterize future suits is that within 45 days of the court's order, a negotiated, "signed agreement between the parents or guardian of each handicapped child not being provided a free public education suited to his needs and the local school district, outlining a specific, individualized program of education to be provided for the child . . ." must be established.

On August 8, 1973, Chapter 89, Laws of 1973, a comprehensive new statute pertaining to the education of the handicapped became effective. After determination of the impact of the new law on the pending litigation, an amended complaint was prepared and filed on August 27, 1973. As is found in the original complaint, there are allegations about violations of equal protection of the laws in that the plaintiff still is "arbitrarily, capriciously, and for no adequate reason" being denied a free public education. It is alleged also that the new law contains language permitting the state to delay implementation of the "remedial sections" of the law. Other charges include violations of due process relating to the absence of "standards and guidelines" by which the state superintendent determines the eligibility of children to attend out of state public facilities or in state private facilities.

CASE v. CALIFORNIA, Civil No. 101679 (Super. Ct. Riverside County, Cal., filed January 7, 1972)

Lori Case is a school age child who has been definitively diagnosed as autistic and deaf and who may also be mentally retarded. After unsuccessfully attending a number of schools, both public and private for children with a variety of handicaps, Lori was enrolled in the multi-handicapped unit at the California School for the Deaf at Riverside, California. Plaintiff attorneys maintain that this unit was created specifically to educate deaf children with one or more additional handicaps requiring special education. Lori began attending the school in May 1970, and is alleged to have made progress—a point which is disputed by the defendants. The plaintiffs argue that to exclude her from Riverside would cause regression and possibly nullify forever any future growth. As a result of a case conference called to discuss Lori's status and progress in school, it was decided to terminate her placement on the grounds that she was severely mentally retarded, incapable of making educational progress, required custodial and medical treatment, and intensive instruction that could not be provided by the school because of staffing and program limitations.

The plaintiffs sought an immediate temporary restraining order and a preliminary and permanent injunction restraining defendants from preventing, prohibiting, or in any manner interfering with Lori's education at Riverside. A temporary restraining order and a preliminary injunction were granted by the Superior Court of the State of California for the County of Riverside.

The arguments presented by the plaintiffs are those seen in other "right to education" cases. The question of the definition of education or educability is raised. The plaintiff attorneys state that "if by 'uneducable' defendants mean totally incapable of benefiting from any teaching or training program, then plaintiffs are in agreement, but defendants' own declaration demonstrate that Lori is not uneducable in this sense. However, if by 'educable' defendants mean 'capable of mastering the normal academic program offered by the public schools,' then defendants are threatening to dismiss Lori on the basis of a patently unconstitutional standard. Application of such a narrow and exclusionary definition, in view of the extensive legislative provisions for programs for the mentally retarded, the physically handicapped, and the multi-handicapped would clearly violate both Lori's rights to due process and equal protection. The right to an education to which Lori is constitutionally entitled is the right to develop those potentials which she has."

Assuming acceptance of Lori's educability, the attorneys argue that "There is absolutely no distinction in law, or in logic, between a handicapped child and a physically normal child. Each is fully entitled to the equal protection and benefits of the laws of this State. Thus, to deprive Lori of her right to an education . . . would violate her fundamental rights."

The issue raised by the defendants regarding staffing and program limitations was answered by pointing out that the courts have ruled that the denial of educational opportunity solely on the basis of economic reasons is not justifiable. And finally the manner in which the disposition of Lori's enrollment at the school was determined was "unlawful, arbitrary and capricious and constituted a prejudicial abuse of discretion." It is pointed out that Lori's right to an education ". . . must be examined in a court of law, offering the entire panaply of due process protections . . . ."

The case was filed on January 7, 1972, and a temporary restraining order was granted the same day. A preliminary injunction was granted on January 28, 1972. Plaintiffs' first set of interrogatories was filed on March 10, 1972, and a trial date set for May 8, 1972. Trial was held on September 5, 1972.

On January 23, 1973, Judge E. Scott ruled that the defendants had acted legally in dismissing Lori Case from the California School for the Deaf. In addition he dissolved the earlier preliminary injunction which had required that Lori be retained in the school.

The court in reaching this decision indicated that since the California public schools were obligated to "educate children of suitable capacity," a status not achieved by Lori Case, there was no responsibility to provide her with an education. Judge Scott defined "suitable capacity" as the "ability of the child over several years of schooling to acquire at least basic vocabulary, reading, writing and mathematical skills commensurate with lower grammar school levels and the ability of the child to participate individually as a pupil and contributing to his classroom group." The court continued by saying that "teaching a child of school age with diminished mental capacity to eat, use toilet facilities, wash, dress, and avoid dangers in her immediate surroundings . . . is not educating such child within the meaning of the Education Code." Further, the court said that the obligation of the state to teach such skills to "autistic, mentally retarded or mentally ill children of limited and diminished mental capacity" is taken care of by state hospitals and institutions. Finally, the court also ruled that the procedural manner in which Lori was discharged from the school was fair and reasonable.

An appeal of this decision will be made in late fall 1973 or early winter 1974; in the Fourth Appellate District of the California Court of Appeals. An amicus brief in support of overturning the lower court decisions will be filed by the Council for Exceptional Children, the National Society for Autistic Children, the National Association for Mental Health, and the National Center for Law and the Handicapped.

BURNSTEIN v. BOARD OF EDUCATION OF CONTRA COSTA COUNTY, Civil No. R-19266 (Super. Ct. Contra Costa County, Cal., filed December 30, 1970)

The plaintiff children are described as autistic for whom inappropriate or no public education programs have been provided. Thus, there are within this suit two sets of petitioners and two classes. The first class includes autistic children residing in Contra Costa County, California, who have sought enrollment in the public schools but were denied placement because no educational program was available. The second class of petitioners includes five children also residing in Contra Costa County and classified as autistic. These children have been enrolled in public special education classes but not programs specifically designed to meet the needs of autistic children.

The complaint alleges that no services were provided to any of the children named until the plaintiffs in October, 1970, informed the defendants that "they were in the process of instituting legal action to enforce their rights to a public education, pursuant to the laws of the state of California and the Constitution of the United States." The children named in the second class were placed in special education programs, but as indicated, not a program designed specifically to meet their needs.

It is argued in the brief that "education for children between the ages of six and sixteen is not a mere privilege but is a legally enforceable right" under both the state laws of California and the United States. Further, it is pointed out that specialized programs to meet the needs of autistic children are required to enable these children to participate fully in all aspects of adult life. It is also indicated that autistic children are educable and that when they are provided with appropriate programs, they can become qualified for regular classroom placement.

Based on the allegation that the petitioners have been denied their rights to an education by the school board who, although knowing of their request for enrollment in programs, "wrongfully failed and refused and continued to fail and refuse . . ." enrollment, the petitioners request the court to command the school board "to provide special classes and take whatever other and further steps necessary to restore to petitioners the right to an education and an equal educational opportunity . . . ."

The arguments presented by the attorneys for the petitioners justify on a variety of legal bases their rights to publicly-supported educational opportunities. In addition to citing the equal protection provisions of both the United States and California Constitutions, it is also pointed out that "denial of a basic education is to deny one access to the political processes. Full participation in the rights and duties of citizenship assumes and requires effective access to the political system . . . ." Further, the attorneys argue that "one may be denied his economic rights through denial of an education." In addition, the petitioners are not only denied the same educational benefits as non-handicapped children, but also are denied that which is provided to other school-age children suffering from mental or physical disabilities. Finally, the attorneys provide an argument that refutes the frequently used high cost rationale for the denial of special education programs. They say that "granting an education to some while denying it to others is blatant grounds that providing one with rights to which he is entitled but unlawfully denied will result in additional expense. If the respondent in this case is unable to receive funding for the required classes from the state, it is incumbent on it to reallocate its own budget so as to equalize the benefits received by all children entitled to an education."

This case was expected to go before the Superior Court of the State of California in and for the County of Contra Costa during winter, 1972. No decision has yet been rendered.

TIDEWATER SOCIETY FOR AUTISTIC CHILDREN v. VIRGINIA, Civil No. 426-72-N (E.D. Va., December 26, 1972)

In August, 1972, suit was entered in the Norfolk Division of the U.S. District Court for the Eastern District of Virginia on behalf of the class of autistic children who as plaintiffs argued against the state of Virginia and the state board of education for their alleged legal right to be provided with a free public program of education and training appropriate to each child's capacity.

The complaint is based upon the "basic premise" that ". . . the class of children which the plaintiff seeks to represent are entitled to an education and that they have a right under the United States Constitution to develop such skills and potentials which they, as a handicapped child, might have or possess. The plaintiff asserts that to deny an autistic child a right to an education is a basic denial of their fundamental rights."

It is also charged in the complaint that discrimination is being practiced against autistic children "since they are educable and no suitable program of training or education is available for them." It is also pointed out that the state has wrongfully failed to provide a program for these children on the basis that "there is not enough money available." The complaint also contains a history of the state's failure to establish pilot programs for approximately 22 children in the Tidewater Virginia area. After the request for funds from the state was reduced from $100,000 to $70,000, the state appropriated $20,000 to serve seven children in the four to seven year age range. Finally, it is alleged that if the requested relief is not granted, there are teen-age members of class ". . . who will not have an opportunity to receive any training or education whatsoever."

Specifically, the relief sought includes:

1. Granting of declaratory judgment that the practices alleged in the complaint violate the Fourteenth Amendment of the U.S. Constitution.

2. Immediate establishment of free and appropriate programs of education and training geared to each child's capacity.

3. "Determine that each and every child, regardless of his or her mental handicap, is entitled to the equal protection of the law and a right to an education in accordance with the child's capacity."

4. Awarding of court and attorney fees to the plaintiffs.

On the 7th of September, the Commonwealth of Virginia submitted to the Court a motion to dismiss the suit for the following reasons:

1. "Plaintiff fails to state a claim upon which relief may be granted."

2. Suits may not be filed against the Commonwealth of Virginia.

3. The complaint should first be heard by a state rather than a federal court.

In December, 1972, the court issued a memorandum, opinion, and order that dismissed the plaintiffs' complaint. In making this judgment, Judge MacKenzie of the Eastern District of Virginia reasoned that although the importance of an equal education is widely recognized, there is nothing in the United States Constitution that ". . . addresses itself to any explicit or implicit guarantee of a right to a free public education." He further explained that because such a right is guaranteed by the Virginia Constitution and state laws, abridgement of that right should first be pursued through appropriate state remedies. Consequently, the court refused "on the basis of comity and the doctrine of equitable abstention . . . the premature attempt to enforce this untested Virginia law."

The argument made by the plaintiffs was that even if the United States Constitution does not provide for the right to free public education, the equal protection clause does provide for equal treatment meaning that if education is provided for some autistic children, it must be provided for all. In responding to this argument, the court recognized the 1972 Virginia legislation calling for mandatory surveying and planning for the education of the handicapped as well as annually reporting progress and statutes that provide tuition for parents of autistic children to use to obtain private school placement for their children in the absence of public programs as a " . . . firm commitment by the state to live up to its equal protection obligation under the 14th Amendment, as well as its own state constitution." In the decision, the court states the assumption that the above statutes would be applied " . . . in a constitutional fashion and at this time it would be premature to hold otherwise." Support for this position is taken from the decision in *Harrison v. Michigan.*

Finally, the court ruled that no violation of equal protection occurred when a selected group of autistic children was selected for a pilot program while other similarly situated children did not have access to the program because the state's action was rationally based and "free of invidious discrimination" and that further " . . . the equal protection clause does not require that a state choose between attacking every aspect of a problem at once or not attacking the problem at all."

UYEDA v. DEPARTMENT OF EDUCATION (California)

In June, 1972, suit was initiated by the mother of Craig Uyeda, a profoundly deaf 10-year-old boy against the California School for the Deaf at Riverside, its superintendent, Dr. Richard Brill, and the associate state superintendent of special education for an alleged violation of the child's civil rights.

Craig, a profoundly deaf child described as being "exceptionally bright" had been placed in the Riverside program since September, 1967. In September 1971, Craig was transferred from the regular program at Riverside to the multi-handicapped unit because of behavior problems that were interferring with his academic progress. The defendants informed the parents in May, 1972, that because Craig was a danger to the staff and other children, his enrollment was to be terminated.

The essence of the plaintiff's complaint is that in the absence of a compelling need and overwhelming necessity, ". . . to deprive Craig of his right to an education, which defendants seek to do, would violate his fundamental rights." It is also argued that "there is absolutely no distinction, in law or in logic, between a handicapped child and physically normal child. Each is fully entitled to the equal protection and benefits of the laws of this state." Finally, it is pointed out that California state law is clear in providing for the education of children with severe handicaps in special programs and that "to then expect such children to perform as well as those children with less severe educational handicaps makes a mockery of the school's duty and constitutes a flagrant violation of the severely handicapped student's right to an education."

Although the relief ultimately being sought is a permanent injunction, the initial request for a temporary restraining order and a preliminary injunction is made on the grounds that expulsion of the child from his present school will result in injury and irreparable harm and possibly the loss of any academic progress made to date. Further, it is alleged that although the defendants indicate there is another appropriate program available in the state, the staff at that program feel that the child is too old. Further, the defendants' original recommendation for the child's placement in the Riverside multi-handicapped unit was based on the availability of the needed behavior modification programs which do not exist at the other school. Finally, plaintiffs allege that Craig's behavioral problems which are the alleged reason for his dismissal are not unique to him and are seen in comparable degrees to other children in the multi-handicapped unit.

While Craig's parents signed a form acknowledging their responsibility to remove the child from school if notified by the superintendent, it is alleged that this consent is suspect for a variety of reasons including the absence of ". . . notions of due process or a prior hearing . . . ." Further, it is indicated that the defendants ". . . failed to specify in advance the basis upon which such determination was to be made, failed to afford an adequate hearing on Craig's termination, and failed to provide a fair record for review or any right of review at all." The plaintiff concludes that "defendants attempt to summarily terminate Craig's constitutional and statutory right to an education at defendant school by such a unilaterial, coercive procedure is wrongful and is violative of the procedural guarantees owing to Craig and his parents under the due process provisions of the United States and California Constitutions."

In addition to seeking a temporary restraining order, a preliminary injunction and a permanent injunction preventing the defendants from interferring in Craig's education at Riverside, the plaintiff is also seeking the cost of the suit.

On June 14, 1972, the court ordered the defendants to show cause why a preliminary injunction should not be granted and in the interim restrained and enjoined the defendants from dismissing Craig from the school.

KIVELL v. NEMOITIN, Civil No. 143913 (Super. Ct. Fairfield County, Conn., filed July 18, 1972)

In a Memorandum of Decision issued by Superior court Judge Robert J. Testo on July 18, 1972 the mother of a 12-year-old Seth Kivell, "a perceptually handicapped child with learning disabilities" was awarded $13,400 to pay for the out-of-state private education the child received for two years when it was held that the defendant Stamford, Connecticut Board of Education did not offer an appropriate special education program for him.

The suit was brought by the mother of Seth Kivell when the child was initially classified by a Stamford Public School diagnostic team as a child in need of special education. The same team recommended a program to the parents who, on the basis of an independent evaluation and recommendation by a consulting psychologist transferred Seth to an out-of-state private school. The parents pursued their alleged rights through a local board hearing at which their appeal was denied and a state board hearing. After a state investigation, the state commissioner of education agreed with the plaintiff that the program offered for that year would not have met the child's needs. The commissioner indicated that if the Stamford board reversed its decision and assumed the tuition costs, the state under existing statutes would reimburse the district. This course was rejected by the Stamford board. The commissioner then ordered the district to submit a plan for his approval for the provision of appropriate special education services. Such a plan was approved and the parents were notified approximately two months after the start of the second school year for which the judgment applied.

Judge Testo wrote after reviewing the state's statutory obligation to handicapped children that "it is abundantly clear from the statutes that the regulation and supervision of special education is within the mandatory duty of the state board of education and that the local town board is its agent charged with the responsibility of carrying out the intent of the law which the minor needs and is entitled to."

An order was also issued "directing the Stamford Board of Education and Superintendent of Schools of said City to furnish the minor with the special education required by the statutes of this State. Compliance of this order shall mean the acceptance and approval by the State Board of Education of the program submitted by the local board of education."

It is worthy of note that the judge anticipated that on the basis of his decision a multitude of similar suits might be filed. Consequently he stated that "this court will frown upon any unilateral action by parents in sending their children to other facilities. If a program is timely filed by a local board of education and is accepted and approved by the state board of education, then it is the duty of the parents to accept said program. A refusal by the parents in such a situation will not entitle said child to any benefits from this court."

IN RE HELD, Docket Nos. H-2-71 and H-10-71 (Family Court, Westchester County, New York, November 29, 1971)

This case heard in Westchester County, New York Family Court concerned the failure of the Mt. Vernon Public Schools to adequately educate eleven year old Peter Held. These proceedings were initiated after Peter Held had been enrolled in the public schools for five years, three of which were in special education classes. During that time the child's reading level never exceeded that of an average first grade student. After the child was removed from the public school and placed in a private school, his reading level in one year increased about two grades and he ". . . became a class leader."

In his decision, Judge Dachenhausen ". . . noted with some concern, the lack of candor shown by the representative of the Mount Vernon city school district in not acknowledging the obvious weaknesses and failure of its own special education program to achieve any tangible results for this child over a five year period." In commenting about the progress made by the child in the private school, the judge said, "It seems that now, for the first time in his young life, he has a future." Further, the judge noted that "This court has the statutory duty to afford him an opportunity to achieve an education."

The court in its ruling issued November 29, 1971, noted that since the child "to develop his intellectual potential and succeed in the academic area" must be placed in a special education setting such as the private school and since, "It is usually preferable for a child to continue at the school where she is making satisfactory progress" (*Knauff v. Board of Education*, 1968, 57 Misc 2d 459) ordered that the cost of Peter Held's private education be paid under the appropriate state statute provisions for such use of public monies. The cost of transporting the child to the private school was assumed by the local district.

It is important to note that a year earlier, the child's mother applied for funds under the same statute for the payment of this private tuition but the application was not approved. This occurred even though "The superintendent of the Mount Vernon public schools" certified that the special facilities provided at the private school were not available in the child's home school district. Also of interest is that in June of 1971, an initial decision rendered on this matter required the state and the city of Mount Vernon, where the child resides to each pay one half of the private school tuition. That decision was vacated and set aside because the city argued that the court lacked jurisdiction over the city because "no process was ever served upon it and it never appeared in any proceeding."

NORTH DAKOTA ASSOCIATION FOR RETARDED CHILDREN v. PETERSON, Civil No. 1196 (D. N.D., filed Nov. 28, 1972)

In late November 1972, a class action right to education suit was introduced in the southwestern division of the North Dakota District Court on behalf of all retarded and handicapped children of school age residing in North Dakota. The plaintiffs include the North Dakota Association for Retarded Children and 13 children who represent all other children similarly situated. The defendants include the state superintendent of public instruction, the state board of education, the state director of institutions, the superintendent of the state school for the mentally retarded, and six local school districts in the state as representative districts.

The 13 named children, ranging in age from 6 to 19 possess levels of intellectual functioning from profound to moderate. In addition, some of the children possess physical handicaps and specific learning disabilities. It is alleged that in order to obtain an education, many of the children have to attend private programs paid for by parents or have to live in a foster home paid for by parents in a community where special education programming is available. In addition, some children, although being of school age, are presently receiving no education or are attending a private day care program or reside in the state school for the mentally retarded where no educational programs are provided.

The importance of an education to all children and in particular to the handicapped is pointed out in the complaint where it is also alleged that only about 27 percent of the 25,000 children in North Dakota needing special education services are enrolled in such programs. It is indicated that the remaining 73 percent are:

1. "enrolled in private educational programs because no public school programs exists, usually at extra expense to the child's family;

2. "are attending public schools, but receiving no education designed to meet their needs and receiving social promotions while they sit in the classroom and until they discontinue their education or become old enough to be dismissed;

3. "are institutionalized at the Grafton State School where insufficient programs exist to meet their educational needs; or

4. "are at home, receiving no education whatsoever."

The specific alleged violations of the law are as follows:

1. The deprivation of the equal protection clause of the 14th Amendment of the United States Constitution in that the state compulsory school attendance laws ". . . arbitrarily and capriciously discriminate between the child whose physical or mental condition is such as to render his attendance or participation in regular or special education programs inexpedient or impractical, and the child deemed to be of such physical and mental conditions as to render his attendance and participation in regular or special education programs expedient and practical." It is also alleged that children excluded from the public school and assigned to "the state school for the mentally retarded are not all offered an education." Further "the superintendent of any [state] institutions may excuse the child from such institution without any reason or hearing thereon, and upon such exclusion the child is without any educational opportunities in the state of North Dakota." Because the state school does not have sufficient capacity for all the children on its waiting list, some children are simply excused from admission by denying their request for admission.

2. The deprivation of plaintiffs' rights of " . . . due process of law in violation of the 14th Amendment of the United States Constitution in that it arbitrarily and capriciously and for no adequate reason denies to retarded and handicapped children of school age the education and opportunity to become self-sufficient, contributing members to the State of North Dakota, guaranteed by the Constitution and laws of the State of North Dakota and subjects them to jeopardy of liberty and even of life."

3. The deprivation of plaintiffs' rights ". . .of equal protection of the law in violation of the 14th Amendment of the Constitution of the United States, in that, excluding plaintiffs from the public schools, it conditions their education to those children whose parents are poor and unable to provide for their children's education otherwise."

4. The deprivation of plaintiffs' rights of " . . . equal protection of the law in violation of the 14th Amendment to the Constitution of the United States, in that plaintiffs' parents are taxed for the support of a system of public education, nevertheless the children are denied the benefits thereof, and they must pay additional monies to secure an education for their children."

5. The deprivation of plaintiffs' rights ". . . of procedural due process of law in violation of the 14th Amendment to the United States Constitution, in that there is no provision for notice or for hearing of any kind, let alone any impartial hearing, with right of cross-examination, prior to or after the exclusion."

6. The use by the defendants of the state compulsory attendance law to permit violations that provide to parents, the decision of whether their child will attend school and further ". . . to mandate non-attendance contrary to the parents' wishes."

7. The confusion by the defendants of the compulsory attendance requirements that exclude ". . . retarded children from school until the age of 7 years and excluding retarded children after age 16, despite their parents' election to the contrary, and the clear statutory guarantee that every child may attend public schools between the ages of 6 and 21 years."

8. The denial of the plaintiffs' ". . . right to attend public school and to an education . . . by excluding and excusing them from school, by postponing their admission to school, by terminating their attendance at 16 years, and by failing to provide education for . . ." the children in residence at the state school for the mentally retarded. This allegation is also based on the equal protection provisions of the 14th Amendment.

9. It is also alleged that in many cases where handicapped children are admitted to school they still are deprived of a meaningful education and "that the failure of the defendants to provide a meaningful education suited to the educational needs of such retarded and handicapped children deprives such children of an education just as certainly as said children were physically excluded from public schools."

10. Finally, the allegation that the exclusion clause of the state compulsory attendance law is unconstitutional and ". . . provides no meaningful or recognizable standard of determining which children should be excused [excluded] from public schools and when used . . ." is a violation of the constitutions of North Dakota and the United States.

The relief the plaintiffs are seeking includes the following:

1. The convening of a three-judge court.

2. Declaration that selected statutes, related regulations and practices are unconstitutional and must not be enforced.

3. Enjoin the defendants from "denying admission to the public schools and an education to any retarded or handicapped child of school age."

4. Enjoin the defendants from "denying an educational opportunity to any child at the Grafton State School" [for the mentally retarded].

5. Enjoin the defendants from "otherwise giving differential treatment concerning attendance at school to any retarded or handicapped child."

6. Require the defendants "to provide, maintain, administer, supervise and operate classes and schools for the education of retarded and handicapped children throughout the state of North Dakota and specifically where hearing shows an inadequate number of classes or schools are provided for the education and training of such retarded or handicapped children." This also applies to the state's institutions.

7. Require the defendants to provide compensatory education to plaintiff children and their class who, while of school age, were not provided with a meaningful education suited to their needs.

8. Plaintiffs' costs for prosecuting the action.

Motions to dismiss this action have been filed by the state and school districts. Plaintiffs plan to pursue the suit despite the passage of a mandatory state law since it is not scheduled to go into effect until 1980 and from their viewpoint is inadequate in its due process provisions.

COLORADO ASSOCIATION FOR RETARDED CHILDREN v. STATE OF COLORADO, Civil No. C-4620 (D. Colo. filed Dec. 22, 1972)

In December, 1972, the Colorado Association for Retarded Children and 19 named mentally, physically, educationally, perceptually or speech handicapped children filed a class action suit against the state of Colorado, the governor, the state departments of education and institutions, the state board of education and 11 Colorado school districts. The substance of the action is the state's alleged failure to provide equal educational opportunities to 20,000 handicapped children. Specifically, the class includes all handicapped children who are eligible for free public education but who have been excluded or excused from attending or otherwise been refused free access to public education.

The named plaintiffs in this case include children with varying degrees of mental retardation, epilepsy, cerebral palsy, autism, learning disabilities with and without hyperactivity, and multiply handicapped children. The individual school histories reveal extensive use of a variety of private programs, including schools, therapies and tutoring as well as universities. Relations with the public schools include instances of oral denial of enrollment, exclusion after enrollment because of inappropriate or no program offering, parental withdrawal because of inappropriate placement and threats of future exclusion due to mobility problems.

Arguments supporting the right of handicapped children to an education are framed within the Colorado constitution which calls for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state for all children between six and twenty-one, the Colorado compulsory school attendance law that provides that the education of children between six and twenty-one shall be free and makes school attendance compulsory for every child between seven and sixteen, and the equal protection clause of the 14th Amendment of the U. S. Constitution.

It is also alleged that the defendants deprive plaintiffs of due process of law and also violate the 14th Amendment of the U.S. Constitution "in that defendants have arbitrarily and capriciously and for no compelling or adequate reason denied to plaintiffs . . . the right to a publicly supported education, and the opportunity to become self-sufficient, contributing members of the community, and have subjected plaintiffs to jeopardy of liberty and even of life." It is also alleged that denial of the plaintiffs' education is conditioned "upon the impermissible criteria of wealth" and that although the parents of handicapped children pay taxes to support public education, their children are denied the benefits of such education.

The complaint also agrees that although Colorado statutes mandate district boards to provide educational programs for all school-age children they have "placed these children (plaintiffs) in an irrational, arbitrary, and unintelligible class and excluded them from association with other children of differing physical and intelligence levels and have denied these plaintiff children the opportunity to progress according to their ability, and have not provided these children with adequate and available programs . . ." Another claim is raised regarding the statutory provision for preschool programs for physically handicapped children despite the contention that all handicapped children require special education earlier than age five. This provision is also alleged to deny some handicapped children due process and equal protection of the law.

The remedies sought by the plaintiffs include:

1. The empaneling of a three judge court.

2. Declaration that the plaintiff children have been unconstitutionally denied their right to a public education suited to their needs, and that the related statutes, policies, regulations, and practices are invalid and unconstitutional.

3. End the practices in question and provide the plaintiffs and their class with a public education within thirty days of the order including appropriate identification and evaluation procedures.

4. Provision of constitutionally adequate due process procedures regarding identification, evaluation and placement of handicapped children.

5. An injunction ordering the state and its agencies including school districts to develop plans for the provision of appropriate education programs to the plaintiffs and their class and detailed due process procedures governing identification, evaluation and placement.

Since this case involved the constitutionality of state laws, the plaintiffs requested the convening of a three-judge district court. The claim for equal educational opportunity was based upon both the state and federal constitutions in the spring, 1973 to dismiss on the basis that no right to an education is protected by the U.S. Constitution after the United States Supreme Court holding in *Rodriguez v. San Antonio School District.*

Plaintiffs countered by distinguishing *Rodriguez* as follows:

1. The discrimination in *Rodriguez* was only relative since all those children received some program of education. In the present case, however, the handicapped plaintiffs experienced a total deprivation under the policies of defendants.

2. The handicapped possess special characteristics that warrant strict inspection of the exclusionary practices which was not present in *Rodriguez.* Therefore, the right to education should be protected here.

3. Since most recent data demonstrate that all children can benefit from education programs, the defendants can show no rational relationship between their state constitutional purpose to educate all resident children and their policy of excluding the handicapped.

The court acknowledging those factual distinctions denied the motion to dismiss. It was further held by the court that although classifications were created by exclusions, they were unwilling as yet to declare them "suspect." Such a determination was reserved pending factual developments expected to emerge at full trial.

DONNELLY v. MINNESOTA, Civil No. 3-72-141 (D. Minn., filed May 2, 1973)

In this class action suit filed on May 2, 1973, two mentally retarded persons alleged that the defendants, including the state and the state board of education, have denied to them and their class free access to a public education. The central question of fact as presented in the complaint is "the capacity of all retarded citizens, whatever their attributed intelligence, to benefit from education . . ."

Plaintiff Donnelly, age 18, represents the class of retarded persons, five to twenty-one eligible for but denied a public education. This class is estimated at 3,000 persons. A second class of retarded persons, age twenty-two and over, is represented by plaintiff Bakken, age 29. This class is estimated to include 1,800 persons who were denied a public education because of their retardation. The two plaintiffs present histories of limited public education and some private education. Both are presently in public programs, one in a day activity center and the other in a rehabilitation center, neither of which, it is alleged, can provide the education program needed.

The complaint presents arguments for "Right to Education" in relation to Minnesota statutes and particularly the state responsibility to provide special instruction for handicapped children of school age (five to twenty-one). Also indicated is that the Minnesota legislature established a system of area vocational schools, a system of vocational rehabilitation services, work activity programs for the mentally retarded and mentally ill in institutions, and a system of junior colleges and state universities. The complaint notes that "these educational services are provided free, or at nominal tuition by the State of Minnesota, and without regard to age of the individual."

Plaintiffs indicate that "the availability of day activity and work activity provide a foundational, continual and necessary framework upon which most mentally retarded individuals can anticipate self-development to their ultimate goal of achieving self-sufficiency." Yet it is alleged that in February of 1973, the Department of Education refused to continue funding work activity, "taking the position that work activity is not education, but rather is maintenance oriented, and also justifying its action on the non-availability of federal funds." Consequently, it is alleged that the only work activity programs available to the mentally retarded are in state institutions, private programs, or those provided from local funds in some school districts.

Plaintiff Donnelly alleges that in order for him to receive an education he must enter a state hospital for the retarded. The complaint further alleges that this denial deprives him and his class "of equal protection of law in violation of the 14th Amendment to the Constitution of the United States in that it arbitrarily and capriciously and with no rational basis discriminates between those school age persons not mentally retarded who are provided a meaningful education process and the mentally retarded who are provided day activity education only . . . ."

It is further alleged that due process of law is also violated in that the state "arbitrarily and capriciously and for no adequate reason denies to retarded children of school age the meaningful education and the opportunity to become self-sufficient, contributing members of the society which is guaranteed by the Constitution of the United States and State of Minnesota and subjects him to jeopardy of liberty and even of life."

Plaintiff Bakken alleges that the state "denied her the right to a work activity program and in fact have arbitrarily, capriciously and illegally refused to fund the educational program she was enrolled in and all other similar programs, except those available at mental institutions." The complaint further alleges that such denial is a violation of the 14th Amendment in that it discriminates "between persons in mental institutions who have these educational opportunities available and those who are not institutionalized . . ." and "between adults who are provided a meaningful education by the state so that they can become useful productive members of society, and mentally retarded adults . . . ."

In addition to judgment requiring the state to provide these programs, the complaint requests the Court to grant plaintiffs the cost of the action.

On May 23, 1973, the defendants' answer to the complaint featured these points:

1. Plaintiff Donnelly is a ward of the state and his natural mother lacks legal capacity for the suit.

2. Plaintiff Donnelly has not exhausted available administrative remedies.

3. Plaintiff Bakken has not utilized alternative state programs to achieve her goals.

4. Aliege that much of the content of the complaint is based on improperly pleaded conclusions of law including the statement that "the opportunity of education, where the state has undertaken to provide, is a right which must be made available to all on equitable terms."

5. Denies knowledge of much of the contents of the complaints regarding the mentally retarded and education.

RAINEY v. WATKINS, Civil No. 77620-2 (Chancery Court of Shelby County, Tennessee, filed April 5, 1973)

This is a petition for a writ of mandamus requiring the defendants to perform their legal responsibility. The named defendants include the Memphis City Board of Education, its Superintendent and Director of Special Education. The plaintiffs allege that the defendants have failed to implement certain provisions of Tennessee's Special Education Act, of April, 1972 which provide for an incremental program for implementation of special education services including three phases: a census to locate handicapped children and a survey of services and facilities; training of professional and para-professional personnel; and the establishment of special education classes and services for all handicapped children.

Petitioners include nine children with a variety of handicaps who are presently in private schools awaiting the development of public school programs or transportation or are inappropriately placed in public schools due to a lack of appropriate programs. Additionally, two petitioners are taxpayers concerned with the lack of educational opportunities for handicapped children and who are participating in the suit as taxpayers who must bear a share of the "tax burden which results from public assistance to and institutional care of handicapped persons who did not receive an education."

Under the provisions of the Tennessee Special Education Act, the census and survey to identify handicapped children was to have been started by June 25, 1972. The training phase was to have been started by October 25, 1972, and conducted in accordance with the need for personnel as indicated by the census. The third phase, establishing facilities for all children is to occur by the beginning of the 1974-75 school year. The petitioners alleged that the defendants have not done the census, and since they were to relate training activities to the census, any training being done prior to completion of the census is not in compliance with the statute.

The two petitioners who are participating in the suit as taxpayers specifically contend that "there are thousands of persons who receive public assistance and/or institutional care due, partially at least, to the failure of the defendants to provide said persons with an education. These persons would be individuals who never acquired the necessary skills for employment because they were denied a public education. These petitioners concede that a substantial amount of their tax dollars will be needed to provide all handicapped children with an appropriate education program. However, they contend that there will be a long-term savings to taxpayers as more handicapped children receive an education and fewer handicapped children grow up to be financial wards of the state and local governments."

The Court ordered an alternative writ of mandamus commanding the defendants to comply with the petition or show cause why it has not been done.

The defendants filed a motion for dismissal on May 8, 1973 based on three points. First, it was alleged that the duties and performance of the State Board of Education and the State Commissioner of Education are "so intimately and inextricably involved with the performance of the local school system of the functions involved in the petition for mandamus that these parties are indispensable parties to this cause of action and that the case at bar cannot proceed in their absence." This point is expressly made in relation to state funding and state approval of local plans. Second, the defendants contend that the Court lacks jurisdiction because the "administrative supervision and judicial review processes set forth have not been utilized by the petitioners." Third, defendants contend that as far as approval and funding has permitted, the census directed by the alternative writ of mandamus was in the process of being carried out. Defendants claimed that their action has been delayed subject to actions of the State Board of Education.

On May 11, 1973, petitioners filed a memorandum of law and facts in response to the defendants' motion to dismiss. In this memorandum the petitioners claimed that the motion to dismiss misconstrued the relief requested, ignored the laws of Tennessee regarding mandamus actions, quoted out of context phrases from the Tennessee Special Education Act, and failed to mention specific provisions of the Act which the petitioners contend are controlling in the issue.

The court held hearings on the motion to dismiss on May 25, 1973. The motion to dismiss was denied and the court gave the school board 30 days to file an answer which should include a report on the status of the census and other relevant data.

KEKAHUNA v. BURNS, Civil No. 73-3799 (D. Hawaii, filed April 12, 1973).

In this class action suit against the state of Hawaii, it is alleged by the plaintiffs who represent all handicapped children that the state has deprived them of their right to an education by totally excluding some children, by shunting some children into inadequately funded private programs, by disciplining some children and placing them in inadequate programs.

The school age plaintiffs include two emotionally disturbed children, one who attends a special class but is not provided with transportation and another who is presently not in school; two mentally retarded children who attend private schools, one at a cost of $1,200 per year; a trainable mentally retarded child attending a private school; a 16-year-old learning disabled student who is presently receiving only a few hours of tutoring per week; and the Hawaii Association for Retarded Children. Specifically, the class which the named plaintiffs represent includes school age persons in Hawaii who, as a result of acts of the defendants, have been denied or excluded from a public school education, have received inadequate educational opportunities, have been erroneously classified as handicapped or retarded, and have been classified, assigned, transferred or dismissed by defendants without procedural due process.

The defendants include the Governor, Board of Education, Departments of Education, Health, and Social Services and Housing, and Accounting and General Services. In addition key administrators in each of those agencies are named.

Plaintiffs' counsel in establishing his argument cites Hawaii statutes and the 14th Amendment of the U.S. Constitution as the basis for the provision of educational opportunities for all children. Other factual claims include the denial of procedural due process and equal protection with regard to classification and placement.

Other specific allegations charged in the complaint are that the defendants do not provide publicly-supported programs for all exceptional children below the age of four, fail to provide transportation to some handicapped children in need of same to receive an education, do not provide "effective" education programs at the state home for the mentally retarded and the state hospital for the mentally ill—both the responsibility of the department of health—did not develop and do not maintain an effective program of identification or assessment of handicapped children and did not develop or maintain adequate programs of vocational training or occupational therapy. It is also charged that as a result of the acts of the defendants, the plaintiff children and their class will "suffer continuing, irreparable harm to their future well-being as students, wage earners, citizens and members of society."

The relief sought by the plaintiffs includes:

1. Declaration that "defendants' practices and policies pertaining to the administration of public education programs are unconstitutional and do not comply with the due process or equal protection clauses of the 14th Amendment to the U.S. Constitution . . ." as they deny access to the public schools for any school age child, exclude children from regular public school placement, do not provide adequate due process and procedural safeguards in classification or placement of children.

2. Require defendants to provide lists of exceptional children who are presently suspended or excluded, presently enrolled or not now enrolled in a publicly supported program of education.

3. Require defendants to develop and implement a program for *accurately* testing the mental and physical capabilities of all school-age children.

4. Require defendants to evaluate the correctness of children's placement and notify the parents or guardian of every child of the results of the evaluation.

5. Require defendants to provide constitutionally adequate prior hearing and review procedures applicable to every student.

6. Require defendants to develop a plan for extending appropriate, publicly funded services to all children.

7. Require defendants to provide plaintiff children, and all members of the class they represent, with a proper placement and adequate program (within a reasonable time not to exceed 75 days).

8. Require defendants to provide plaintiff children with compensatory services to overcome the effects of any past misplacement or wrongful exclusion.

9. , Require defendants to correct plaintiffs' school records with respect to erroneous entries.

10. Require defendants to review, at least semi-annually, the correctness of each child's placement.

11. Award to plaintiffs costs of this action.

A series of legal events have occurred since the case was originally filed:

1. May 14, 1973—defendants filed a Motion to Dismiss and a Motion to Strike, or alternatively, For a More Definite Statement.

2. June 7, 1973—Plaintiffs filed a motion for determination of class action.

3. August 20, 1973—Stipulation on certifying the class was filed.

4. August 23, 1973—Defendants filed a motion for the federal court to abstain from hearing the case.

FLORIDA ASSOCIATION FOR RETARDED CHILDREN v. STATE BOARD OF EDUCATION, Civil No. 73-250-250—Civ. NCR (S.D. Fla. filed Feb. 5, 1973)

The Florida Association for Retarded Children, the Dade County Association for Retarded Children and 12 school age persons possessing a variety of handicaps representing the class of all persons similarly situated have brought this right to education lawsuit against the governor and the State Board of Education, Commissioner of Education, Director of the Division of Elementary and Secondary Education, Chief of the Bureau of Curriculum and Instruction, Administrator of Education for Exceptional Children, Secretary of the Department of Health and Rehabilitative Services, Director of the Florida Division of Retardation, and the Dade County and Broward

Education, Chief of the Bureau of Curriculum and Instruction, Administrator of Education for Exceptional Children, Secretary of the Department of Health and Rehabilitation Services, Director of the Florida Division of Retardation, and the Dade County and Broward County Boards of Public Instruction.

The complaint seeks to establish one class for the plaintiffs containing three subclasses that may number 160,000 and a class for defendants as defined below:

Class I—"All exceptional children in the State of Florida who have been and will be totally excluded from an opportunity to receive a public education solely because of their physical, mental, emotional and/or specific learning disability."

Subclass A—"All exceptional children who have been and will be denied an opportunity to receive a public education before seven (7) years of age, solely because of their physical, mental, emotionally and/or specific learning disability."

Subclass B—"All exceptional children who have been and will be denied an opportunity to receive a public education upon reaching 16 years of age solely because of their physical, mental, emotional and/or specific learning disability."

Subclass C—"All persons who are under the care of the Department of Health and Rehabilitative Services who have been and will be totally excluded from an opportunity to receive a public education up to the age of 21 years, solely because of their physical, mental, emotional, and/or specific learning disability."

Class II—A class of 67 school boards that operate public schools in Florida. The Dade and Broward County School Boards are representative of this class.

It is alleged that the exclusion of the plaintiffs in the major class and subclasses is a violation of "the equal protection clause of the 14th Amendment to the Constitution of the United States by creating classificatons which are arbitrary, irrational and devoid of any compelling state interest, depriving plaintiffs and members of their class of their fundamental right to an education."

Plaintiffs' attorney alleges that the statute defining exceptional children to include educable and trainable mentally retarded children creates two classes of mentally retarded children: those who are "educable and trainable" and those who are not, and that this classification deprives one of the plaintiffs and that class of their right to an education in violation of the 14th Amendment.

A further allegation is that each of the plaintiffs was excluded from a public education without notice, hearings or an opportunity to be heard and that these policies and practices of the defendants deprive the plaintiffs and their class of procedural due process of law in violation of the 14th Amendment.

Also alleged is that despite Florida statutes requiring the Department of Health and Rehabilitative Services to establish education programs for the clients it serves below age 21, the two plaintiffs residing in the Miami Sunland Training Center and their class have been deprived of an education in the facility and denied procedural due process relating to that decision.

Finally, the complaint alleges that the denial of equal education opportunity to the named plaintiffs by the defendants has harmed and damaged each of them and each member of their class in excess of $10,000.

Relief sought includes:

1. Invoking a three judge court to declare unconstitutional and a violation of the 14th Amendment, the state statutory exclusion from public education of children not "educable or trainable."

2. Declare the present policies and practices of the state regarding the exclusion of the plaintiffs and their class a violation of the 14th Amendment of the U.S. Constitution.

3. To halt the continuation of the alleged exclusion practices.

4. Require defendant school districts to establish constitutionally adequate due process procedures regarding any possible infringement of plaintiffs' right to an education.

5. Require defendants to provide education to clients of the department of health and rehabilitative services.

6. Award to each plaintiff and to each member of their class and respective subclasses an amount in excess of $10,000.00 as compensatory damages resulting from defendants' failure to provide educational opportunities.

7. Award costs and reasonable attorneys' fees in favor of the plaintiffs.

Upon filing, the defendants moved for dismissal. This was followed by plaintiffs' filing of an amended complaint that added that depriving individuals of an education contributed to the fundamental constitutional right of speech and the right to participate in elections on an equal basis with other citizens. The amended complaint also added that any classification imposed upon the plaintiffs because of their "unique disabilities" is suspect because of the manner in which society has and continues to treat the handicapped. Finally, the request for the court to award compensatory damages was deleted.

Defendants filed for dismissal a second time and plaintiffs filed a memorandum in response to this second motion to dismiss. These motions are presently under consideration by the court.

On July 1, 1973, new law was enacted in Florida which amended the Florida statutes to provide exceptional children with the right to a hearing. Because the creation of the hearing right changed the complexion of the suit, the federal court on September 26, 1973 abstained pending determination as to whether remedies for the original allegations are now available under state law.

WILCOX v. CARTER, Civil No. 73-41-CIV-J-T (filed January 7, 1973)

This class action suit was brought against the Duval County, Florida School Board, the Superintendent of Schools, and the Director of the Exceptional Child Education Department for failure to provide free public education to the exceptional children residing in Duval County. The named plaintiff is a 10 year old mentally retarded child who represents a class "consisting of all persons, residents of Duval County, Florida, aged 5 to 21 years, who are, have been or will be excluded from the public schools of Duval County on the grounds that they are exceptional children unsuited for enrollment in a regular class." The class of children includes, but is not limited to the mentally retarded, the speech impaired, the deaf and hard of hearing, the blind and partially sighted, the crippled and other health impaired, the emotionally disturbed, and those with specific learning disabilities.

After waiting a year for school admission and attendance for three days, the plaintiff was requested to withdraw from a program for trainable mentally retarded children on the grounds that he was not toilet trained. In March 1972, approximately 2½ years later, application for admission was again made to the public school since the child had become toilet trained. In March, 1972, the child was placed on a waiting list "since no openings were presently available." It is charged that the public schools has provided no educational opportunities to the child since his exclusion in September, 1969.

The basis of the suit is that the act of exclusion and the manner in which it was done violated the class and plaintiff's constitutional rights of due process and equal protection.

The relief sought included the following:

1. provide plaintiffs with a publicly-supported education within 30 days;

2. submit a list of exceptional children presently excluded within 14 days, and the reasons for the date of their exclusions;

3. notify the parents of such children and inform them of the child's proposed educational placement;

4. publicly announce to all parents within Duval County that all exceptional children have a right to an education;

5. hold constitutionally adequate hearings before a master or other appropriate person for members of the plaintiff class;

6. correct the school records of plaintiffs as to past wrongful exclusions;

7. submit within 30 days a plan for adequate hearing procedures to precede any change in a child's enrollment.

On January 31, 1973, the defendants filed a motion for abstention which was granted.

See also *Florida Association for Retarded Children v. State Board of Education.*

BRANDT v. NEVADA, Civil No. R-2779 (D. Nev., filed Dec. 22, 1972)

At the outset of the complaint in this case, it is stated that the purpose of the suit is to require "the state of Nevada to provide a free public education to all of its children, equally, without regard to the fact that certain of its children are physically or mentally handicapped."

Named in the suit as plaintiffs are eleven physically or mentally handicapped children ranging in age from five to seventeen. Seven presently reside at the Nevada State Hospital for the mentally retarded and four are at home with their parents. The plaintiffs are bringing suit on behalf of themselves and for "all other persons, residents of the State of Nevada, aged three to twenty-one years, who are eligible for a free public education" but who have been excluded from, denied access to, or have been delayed admission to public schools. The plaintiffs allege that 2,507 out of a possible 14,000 handicapped children of school age in the state are attending the public schools.

Denfendants are the State of Nevada, State board of Education, State Department of Education, State Superintendent of Public Instruction and Boards of Trustees of Nevada's school districts.

The complaint charges that plaintiffs and their class have been denied an educational opportunity equal to that provided to nonhandicapped children and to some handicapped children. Violations of the due process requirements of the Fourteenth Amendment are also charged because "the procedures by which plaintiffs are excluded or suspended from public school are arbitrary . . ." and fail to include many of the required elements of constitutionally adequate due process.

Relief sought includes:

1. Convening a three-judge court to declare the Nevada statutes, practices and policies permitting school districts to deny any or some handicapped children from a public education unconstitutional. Also sought is declaration that statutes denying adequate due process in making decisions about the education of handicapped children is unconstitutional.

2. Specifically sought is a declaration that the following statute is unconstitutional: "the number of physically handicapped or mentally retarded minors within a school district is so small, the distance to another public school where such instruction is offered is so great, or the services of a qualified teacher cannot be obtained," then the school district does not have to make special provisions for the education of the handicapped. It is unconstitutional on the grounds that elimination of the mandatory requirements as to some children because of arbitrary conditions fails to provide equal protection.

3. Similar declaration is sought regarding the statute that a school district cannot be required to provide for the education of handicapped minors "in excess of the number determined to be 2½ percent of the total pupil enrollment of the school district in which plaintiffs reside."

4. Require school districts where "an inadequate number of classes or schools are provided for the education of handicapped children, directly to provide, maintain, administer, supervise, and operate classes and schools for the education of handicapped children . . . ."

5. Require the defendants "to provide compensatory years of education to each person who has been excluded, excused or otherwise denied the right to attend school while of school age."

6. Award costs to the plaintiffs.

In a companion memorandum in support of the motion to convene a three judge court submitted by the plaintiffs, emphasis was placed on the movement by states to be required to provide all children with a free public education. Further it was argued that the issue involved in the case is of sufficient magnitude to warrant the court to apply a "strict standard of review." Other reasons presented to obtain this view of the case by the court are that handicapped children constitute a "distinct and insular minority" and that defendants' actions produced a "suspect wealth classification."

Although changes in Nevada statutes were made in the last session to eliminate the 2½ percent service limitation, a limit still exists. Meanwhile the case is pending.

DAVID P. v. STATE DEPARTMENT OF EDUCATION, Civil Action No. 658-826 (Super. Ct. San Francisco County, Cal., filed April 9, 1973)

This class action suit was filed on April 9, 1973 in a California Superior Court Section of the California Education Code which limits the number of educationally handicapped students who may be enrolled in special education programs to 2% of the students enrolled in the school district. It is charged that this limitation is arbitrary and irrational and is a violation of equal protection as provided by the U.S. and California Constitutions. Educationally handicapped minors are defined as:

> minors who, by reason of marked learning or behavior disorders, or both, cannot benefit from the regular education program, and who, as a result thereof, require the special education programs authorized by this chapter. Such learning or behavior disorders shall be associated with a neurological handicap or emotional disturbance and shall not be attributable to mental retardation. (*The Educationally Handicapped Minors Act.* SS 6750.)

David P. and Michael P. are natural brothers, ages 12 and 11, respectively, who are both neurologically handicapped and possess neurological disabilities that impair their perceptual skills. David P. was formally certified by the school district as an educationally handicapped minor and was placed on a waiting list for admission to a special education class. It is alleged, however, that there is no realistic possibility of his being admitted to such a program during this year or within the following school year. Michael P. applied for admission to a special education program in August, 1972, but his application has not yet been acted upon. The named plaintiffs represent a class which consists of (a) all minors who have been certified for, but not admitted to, special education programs for the educationally handicapped; and (b) all minors who are eligible for certification to special education programs for the educationally handicapped but who have not been certified for admittance to such programs.

Defendants are the State Department of Education, State Board of Education, Superintendent of Public Instruction, Superintendent and Board of Education of South San Francisco Unified School District, and the Superintendent of Schools for San Mateo County.

Plaintiffs allege that the defendants are empowered under the law to grant authorization to school districts to exceed the 2% limitation but have refused to grant such authorization. The plaintiffs argue that no more than 500 students throughout the entire state have been admitted to special education classes under such waivers during the academic years 1971-73 and that there are 770 and 160 educationally handicapped students on waiting lists for admission to special education classes in the two named defendant local school districts. It is further alleged that the assignment of an educationally handicapped minor to a regular educational program where he is denied the opportunity to acquire needed skills for participation in the society constitutes, in fact, a denial of an education.

Denying these children access to an appropriate education suited to their needs is contrasted in the complaint by indication that similar children who are provided such programs "are able to learn and benefit from their educational experience."

The complaint presents the following five causes of action:

1. Violation of the rights of the plaintiffs and their class to an education.

2. Violation of equal protection between a) the plaintiffs and their class and other educationally handicapped minors who are admitted to special education classes; b) other handicapped children who are admitted to special education classes without regard to the percentage of students enrolled in such classes; and c) children enrolled in regular education programs appropriate to their needs.

3. Violations of the "mandate of the California Education Code that the course of instruction be suitable for the particular needs of the individual students."

4. Violations of due process in that no hearing or appeal procedures exist regarding the exclusion of educationally handicapped children from the special program.

5. Failure to provide these special programs "invidiously discriminates against those indigent parents who are unable to afford the costs of tuition at private schools" for their educationally handicapped children.

Relief sought by the plaintiffs includes preliminary and permanent injunctions requiring the defendants to provide special education programs for the named plaintiffs and their class and to prevent defendants from excluding educationally handicapped children from special programs without notice and constitutionally adequate hearings and periodic review.

RHODE ISLAND SOCIETY FOR AUTISTIC CHILDREN v. BOARD OF REGENTS FOR EDUCATION OF THE STATE OF RHODE ISLAND, C.A. No. 5081 (D.R.I., filed Jan. 22, 1973)

This class action suit has been brought on behalf of all "exceptional handicapped children" in Rhode Island, a class which plaintiffs allege may be as large as 14,000 children. Handicapped children are defined by Rhode Island statutes as children "either mentally retarded or physically or emotionally handicapped to such an extent that normal educational growth and development is prevented."

Included within the total class are three subclasses. Subclass A is defined as "all members of the class who are excluded from publicly supported education." Subclass B is defined as "all members of the class who are excluded from regular classes and who have been placed in publicly supported facilities or special classes." Subclass C is defined as "all members of the class who are in regular classrooms but are in need of special education or supplemental educational assistance."

Among the allegations presented by the plaintiffs are that the defendants fail to provide adequate and suitable public education and that there is failure to provide due process hearings when decisions are made about placing children in programs or excluding them from programs. In presenting these allegations, the plaintiffs argue that failure to provide these children with a public education will result in harm to their future lives as citizens and wage earners.

The issues of stigmatization and the self-fulfilling prophecy are discussed in relation to the due process allegation. In making these allegations the plaintiffs charge the defendants with violating provisions of the U.S. Constitution and Rhode Island statutes providing for equal protection and due process of the laws.

The relief sought by the plaintiffs includes declaration of the right of all children to receive an adequate, suitable education including special education whenever it is needed. Additionally sought is an order specifying that no child shall be removed from placement in a regular education program without constitutionally adequate notice and due process hearings, that periodic evaluation of special education programs be conducted, that parents be reimbursed for costs of obtaining an education for their previously excluded children, and that compensatory education be provided for children who were previously excluded or inappropriately placed in special or regular classes.

KENTUCKY ASSOCIATION FOR RETARDED CHILDREN v. KENTUCKY STATE BOARD OF EDUCATION, Civil No. 435 (E.D., Ky., filed Sept. 6, 1973)

On September 6, 1973, this class action right to education suit was filed against the Kentucky Board of Education, the State Superintendent, and the Fayette County Board of Education and its Superintendent by a coalition of organizations involved in advancing the interests of exceptional children in Kentucky. Included are the Kentucky Federation Council for Exceptional Children, Kentucky Association for Retarded Children, United Cerebral Palsy of Kentucky, Kentucky Parents of Children with Communication Disorders, Jefferson County Association for Children with Learning Disabilities, and the Greater Louisville Council for the Hearing Impaired.

The suit is being brought specifically on behalf of all "exceptional children" who meet the statutory definition to be so categorized and who have been "(1) excluded from the public schools of the state of Kentucky, (2) excused from attendance at public schools of the state of Kentucky, (3) otherwise denied education or training suitable for their condition in the public schools of the state of Kentucky, (4) or otherwise denied education or training suitable for their condition by agencies or instrumentalities of the state of Kentucky, and consequently have been (a) denied a free publicly supported education suited to their needs . . . or (b) are enrolled in certain 'programs' which do not provide education suited to the children's needs."

Nine school age children possessing mild, moderate and severe mental retardation, multiple handicaps, blindness, deafness, physical handicaps, speech defects and immaturity coupled with a lack of communicative skills are the named plaintiffs. The Fayette County Board of Education has been named in the suit as representative of the "approximately" 190 county and independent school districts in Kentucky.

The complaint in essence argues that free public education, where the state has undertaken to provide it, is a right that must be made available to all on equal terms. In the instant case, deprivation of this right to the plaintiff children is a violation of the equal protection clause of the fourteenth amendment of the constitution. Specific issue is taken with Kentucky statutes that require local school boards to exempt from compulsory education children "whose physical or mental condition prevents or renders inadvisable attendance at school or application to study" and any child "who is deaf or blind to an extent that renders him incapable of receiving instruction in the regular elementary or secondary schools, but whose mental condition permits application to study." In the case of deaf or blind children who are in the latter category, the state superintendent "may cause such children to be enrolled at the Kentucky Sschool for the Blind or the Kentucky School for the Deaf." It is charged however that those institutions are "extremely secretive and refuse to accommodate all the children who wish to attend them" resulting in some of these children being totally denied a public education. The complaint also charges that the statutory mandatory planning requirement that "by July 1, 1974, all county and independent boards of education shall operate special educational programs to the extent required by, and pursuant to a plan which has been approved by the state board of education . . ." gives the state board "complete discretion . . . to approve a plan which provided for no programs for any of the classes of children represented by the plaintiffs herein or which fails to provide for programs for all the classes of children represented by the plaintiffs herein."

Plaintiffs' attorney also charged in the complaint that the exclusion of exceptional children from public school is "arbitrary, capricious and irrational, and constitutes invidious discrimination." Further, it is argued that "there is no compelling state interest nor even any

rational basis justifying the defendants' exclusion of the plaintiff children. In addition, any classification imposed upon the plaintiffs to suspect they have been saddled with such disabilities, subjected to such a history of purposeful unequal treatment and relegated to such a position of political powerlessness as to command extraordinary protection."

Charges are also presented that in the process of excluding children from public school, little or no procedural due process is provided to the plaintiff children or their families.

Included in the relief sought is the following:

1. The court issue declaratory judgments that once Kentucky has undertaken to provide public education, it must be made available to all children "regardless of their physical, mental, or emotional condition" and that all school districts must provide programs for these children.

2. The court declare unconstitutional that law which classified some children as incapable of benefiting from education.

3. The court declare that provision of education to deaf or blind children in the state residential schools is not satisfactory.

4. The court declare that no child may be excluded from regular school programs on the basis of classification as "incapable of participating in the regular program" without providing to the child and his parents full hearing and timely and adequate review of his status.

5. The court issue permanent injunction requiring the state and its district to develop plans to serve all plaintiff children and their class by September, 1974 as a condition to receive minimum or other state funds; to identify all children; and to establish a full hearing and timely review procedures for all children "considered by school officials to be incapable of participating in the regular program of instruction."

6. The court appoint a master.

7. The award to plaintiffs of court costs and attorney's fees.

On October 24, the state in its answer to the complaint offered nine defenses to plaintiffs' charges and requested the court to dismiss the suit. Among the defenses presented by the state are:

1. That the state does not have equal obligation "to provide a free public education to all children."

2. That the state is presently "endeavoring to obtain additional and improved educational services for exceptional children."

3. That "the 1974 General Assembly will enact legislation and appropriate funds which will have a direct bearing upon the claims asserted by plaintiffs in this action."

4. That "the complaint fails to state a claim upon which relief can be granted."

RIGHT TO TREATMENT

WYATT v. ADERHOLT, 334 F. Supp. 1341 (N. D. Alabama, 1971), 325 F. Supp. 781 (N. D. Alabama, 1971)
WYATT v. STICKNEY, 344 F. Supp. 387 (N. D. Alabama, 1972); ***appeal docketed***, No. 72-2634, 5th Cir., (argument heard December 6, 1972).

This action, originally focusing on the claim of state hospitalized mentally ill patients to receive adequate treatment, began in September, 1970, in Alabama Federal District Court. In March, 1971, Judge Johnson ruled that mentally ill patients involuntarily committed to Bryce Hospital were being denied the right "to receive such individual treatment as (would) give each of them a realistic opportunity to be cured or to improve his or her mental condition." The court gave the defendants six months to upgrade treatment, to satisfy constitutional standards, and to file a progress report. Prior to the filing of that report, the court agreed to expand the class to include another state hospital for the emotionally ill and the mentally retarded at the Partlow Sate School and Hospital.

The defendant's six month progress report was rejected by the court and a hearing was scheduled to set objectives and measurable standards. At the hearing in February, 1972 evidence was produced which led the court to find "the evidence . . . has vividly and undisputably portrayed Partlow State School and Hospital as a warehousing institution which because of its atmosphere of psychological and physical deprivation, is wholly incapable of furnishing habilitation to the mentally retarded and is conducive only to the deterioration and the debilitation of the residents." The court further issued an emergency order "to protect the lives and well-being of the residents of Partlow." In that order the court required the state to hire within 30 days 300 new aide-level persons regardless of "former procedures," such as civil service. The quota was achieved.

On April 13, 1972, a final order and opinion setting standards and establishing a plan for implementation was released. In the comprehensive standards for the total operation of the institution are provisions for individualized evaluations and plans and programs relating to the habilitation ("the process by which the staff of the institution assists the resident to acquire and maintain those life skills which enable him to cope more effectively with the demands of his own person and of his environment and to raise the level of his physical, mental, and social efficiency"). Habilitation includes, but is not limited to, programs of formal structured education and treatment of every resident. Education is defined within the order as "the process of formal training and instruction to facilitate the intellectual and emotional development of residents." The standards applying to education within the order specify class size, length of school year, and length of school day by degree of retardation.

Finally, the court requires the establishment of a "human rights committee" to review research proposals and rehabilitation programs, and to advise and assist patients who allege that the standards are not being implemented or that their civil rights are being violated. Further, the state must present a six-month progress report to the court and hire a qualified and experienced administrator for the institution.

In December, 1972, the U.S. Court of Appeals for the 5th Circuit heard arguments on the appeals of both Wyatt and Burnham (CA.) which had been joined. The court is presently preparing a decision.

BURNHAM v. DEPARTMENT OF PUBLIC HEALTH OF STATE OF GEORGIA, 349 F. Supp. 1335 (N. D. Georgia, 1972); ***appeal docketed***, No. 72-3110, 5th Cir., (argument heard December 6, 1972).

This is a suit seeking class action status on behalf of all patients voluntarily or involuntarily committed to any of the six state-owned and operated facilities named in the complaint and operated for the diagnosis, care and treatment of mentally retarded or mentally ill persons under the auspices of the Department of Public Health of the State of Georgia. Each of the named plaintiffs is or has been a patient at one of these institutions. The case was filed on March 29, 1972, in the United States District Court for the Northern District of Georgia.

Defendants in this case are the Department of Public Health, the Board of Health of the State of Georgia, and Department and Board members and officials; the superintendents of the six named institutions; and the judges and courts of ordinary of the counties of Georgia, which are the courts specifically authorized by Georgia law to commit a person for involuntary hospitalization.

The complaint alleges violations of the 5th, 8th, and 14th Amendments to the U.S. Constitution. It seeks a preliminary and permanent injunction and a declaratory judgment. Specifically, the declaratory relief sought includes a court finding that the patients in the defendant institutions have a constitutional right to adequate and effective treatment; a court finding that each of the institutions named in the complaint is currently unable to provide such treatment; and a holding by the Court that constitutionally adequate treatment must be provided to the patients in the institutions named in the complaint.

The plaintiffs requested the following:

1. That defendants be enjoined from operating any of the named institutions in a manner that does not conform to constitutionally required standards for diagnosis, care and treatment;

2. That defendants be required to prepare a plan for implementing the right to treatment;

3. That further commitments to the defendant institutions be enjoined until these institutions have been brought up to constitutionally required standards; and

4. That the Court award reasonable attorney's fees and costs to counsel.

Defendants filed an answer to plaintiffs' complaint on April 21, 1972, in which they raised several legal defenses, such as lack of jurisdiction, and moved to dismiss on several grounds.

On August 3, 1972, Judge Sidney D. Smith, Jr. granted the defendant's motion for summary judgment and dismissed this case. The ruling of the court centered on the following major points:

1. The court could find no legal precedent to allow for the declaration that there exists a "*federal constitutional* right to treatment (to encompass 'care' and 'diagnosis') for the mentally ill." Based on this finding, the judge ruled that the action could not be maintained.

2. Judge Smith, in his decision, disagreed with the *Wyatt* Alabama decision, primarily on the basis of the absence of a federal statute requiring the right to treatment. He added that "the factual context in those Alabama decisions (budgetary lots by the state legislature causing further deterioration of an existing deficient institutional environment) is also substantially different from the existent situation in the Georgia mental health institutions."

3. The court also held that ". . . a conclusion as to the lack of jurisdiction over the person of named defendants is also compelled by the eleventh amendment to the U.S. Constitution." This conclusion was based upon the failure to demonstrate the ". . . denial of a *constitutionally* protected right nor a *federally* guaranteed statutory right."

4. Judge Smith also commented about the appropriateness of the courts in defining "adequate" or "constitutionally adequate" treatment.

Specifically he wrote that these questions ". . . defy judicial identity and therefore prohibits its breach from being judically defined." Further, he acknowledged the defendants' argument that "the question of what in detail constitutes 'adquate treatment' is simply not capable of being spelled out as a mathematical formula which could be applied to and would be beneficial for all patients. Everyone knows that what might be good treatment for one patient could be bad or even fatal for another."

See last paragraph of *Wyatt v. Aderholt* for status of this case.

RICCI v. GREENBLATT, Civil No. 72-469F (D. Mass., filed Feb. 7, 1972)

This is another class action suit regarding the right to treatment in institutions. The plaintiffs were children in the Belchertown State School in Massachusetts and the Massachusetts Association for Retarded Children, who like in the Wyatt, Parisi, and New York Association for Retarded Children actions, alleged violations of their constitutional rights. The defendants were various state officials and officials of the school. Motions for a temporary restraining order and preliminary injunction were granted by the court in February, 1972, which serves to maintain the status quo until litigation is completed.

Among the provisions of those orders was that "the defendants develop comprehensive treatment plans for the residents which include adequate and proper educational services." On April 20, 1972, the defendants had filed answers to all allegations of the plaintiffs' complaint.

This case has been reassigned to another district court judge. A contempt motion was also filed against the defendants for their failure to carry out issued orders.

NEW YORK STATE ASSOCIATION FOR RETARDED CHILDREN and PARISI v. ROCKEFELLER, Cases No. 72-C-356-7 (E. D. N.Y. April 10, 1973)

These two actions were filed together in the U.S. District Court for the Eastern District of New York. Both alleged that the conditions at the Willowbrook State School for the Mentally Retarded violated the constitutional rights of the residents. These class action suits are modeled after the *Wyatt v. Aderholt* (Partlow State School and Hospital, Alabama) case.

Extensive documentation was presented by the plaintiffs alleging the denial of adequate treatment. The evidence touched all elements of institutional life including: overcrowding, questionable medical research, lack of qualified personnel, insufficent personnel, improper placement, brutality, peonage, etc. It is alleged in the *Parisi, et. al. v. Rockefeller* complaint that "No goals set for the education and habilitation of each resident according to special needs and specified period of time." It was specifically charged that 82.7 percent of the residents are not receiving school classes, 98.3 percent are not receiving pre-vocational training, and 97.1 percent are not receiving vocational training.

The plaintiffs in Parisi, et. al. are seeking: declaration of their constitutional rights, establishment of constitutionally minimum standards for applying to all aspects of life; due process requirements to determine a "developmental program" for each resident; development of plans to construct community-based residential facilities and to reduce Willowbrook's resident population; cessation of any construction of non-community based facilities until the court determines that sufficient community based facilities exist; and appointment of a master to oversee and implement the orders of the court.

Both complaints include specific mention of the necessity for including within "developmental plans" and subsequent programs, appropriate education and training.

In an April 10, 1973, 90-page Memorandum and Order, Judge Orrin G. Judd declined to rule that mentally retarded residents of Willowbrook have a constitutional right to adequate habilitation. He did, however, find that they do have a constitutional right to be free from harm and ordered appropriate relief. In its decision, the Court noted that a number of significant steps had been taken since the filing of the suit to improve Willowbrook including the closing of admissions and a transfer of residents from Willowbrook to other institutions; the elimination of seclusion practices; administrative changes including the appointment of a new director of education and training; establishment of a behavior modification project; and an expansion of efforts to recruit staff.

Subsequent to his finding no constitutional right to treatment for Willowbrook's residents, Judge Judd did specify that "Since Willowbrook residents are for the most part confined behind locked gates, and are held without the possibility of a meaningful waiver of their right to freedom, they must be entitled to at least the same living conditions as prisoners. The rights of Willowbrook residents may rest on the Eighth Amendment, the Due Process of the Fourteenth Amendment, or the Equal Protection Clause of the Fourteenth Amendment."

The court held that among the rights possessed by Willowbrook's residents are the right to protection from assaults by other residents or staff; the right to conditions conforming to "basic standards of human decency"; the right to medical care; the right to exercise and have outdoor recreation; and the right to adequate heat during cold weather; and the right to the necessary elements of basic hygiene. Judge Judd also ruled that the defendants should quickly increase the number of ward attendants, physicians, nurses, physical therapists and recreation therapists with salary ranges established by the court if those developed by the state were inadequate to attract the needed personnel. Finally, the court required that the defendants file periodic reports indicating their progress in conforming to the court's order.

On May 22, 1973, the court issued a modified order in which it reserved making "final judgment with respect to the plaintiffs' constitutional claims of equal protection and the right to treatment or habilitation" until further evidence, expert testimony and legal argument were presented. The court also ruled that the FBI should be permitted to monitor the implementation of the earlier order.

WELSCH v. LIKINS, No. 4-72 Civil No. 451 (D. Minn.)

In this action six plaintiffs are named as representatives of a 3,500 member class--persons presently in Minnesota's state hospitals for the mentally retarded. Named defendants are the present and former acting commissioners of public welfare and the chief administrator of each of the state's six hospitals.

The plaintiffs include severely and moderately retarded persons who are allegedly denied their right to due process of law since they do not receive ". . . a constitutionally minimal level of 'habilitation,' a term which incorporates care, treatment, education, and training." It is specifically charged that the plaintiffs and others similarly situated are not provided with a humane psychological and physical environment. The complaint presents supporting evidence that some residents live in "old, poorly designed and hazardous" buildings not meeting state board of health safety and health standards, 'over-crowded dormitories,' bleak accommodations; and improperly equipped bathroom and toliet facilities. Additionally, it is indicated that residents are "subject to threats and physical assaults by other residents," improperly clothed, and denied any personal privacy.

It is further alleged that there is both an insufficient quantity of staff and insufficiently trained staff necessary to provide appropriate programs of habilitation. Due to staff shortages many residents have been forced to work in the institution as employees yet, according to the complaint, are denied payment as required by the fair labor standards act. Another allegation is that the "defendants have failed and refused to plan for and create less restrictive community facilities . . ." even though many members of the class could function more effectively in such programs.

It is further argued that "the final condition for constitutionally adequate habilitation is the preparation for each resident of an individualized, comprehensive habilitation plan as well as a periodic review and re-evaluation of such a plan. On information and belief, defendants have failed to provide plaintiffs and the class they represent with a comprehensive habilitation plan or to provide periodic review of these plans."

The plaintiffs are seeking a judgment to include the following:

1. A declaratory judgment that Minnesota's state institutions ". . . do not now meet constitutionally minimal standards of adequate habilitation including care, treatment and training."

2. A declaratory judgment specifying constitutionally minimal standards of adequate habilitation for mentally retarded persons confined in the state institutions under the supervision and management of the commissioner of public welfare.

3. Injunctions preventing defendants "from failing or refusing to rectify the unconstitutional conditions, policies and practices" described in the complaint and requiring them to "promptly meet such constitutionally minimal standards as this Court may specify."

4. Injunctions requiring the defendants "to pay plaintiffs and the class they represent working in the named institutions the minimum wage established pursuant to the Fair Labor Standards Act as amended, 29 U.S.C. Sec. 201 et. seq." This was dropped from the suit after the complaint was originally filed.

5. Appointment of a master.

6. Awarding of costs to the plaintiffs.

Added to the complaint was legal theory regarding cruel and unusual punishment (see *N.Y. State Association for Retarded Children and Parisi v. Rockefeller).*

During a pre-trial conference in the spring, an agreement was reached to proceed with trial only against the Cambridge State Hospital. Pending the outcome, cases against the other five facilities are being held in abeyance.

The trial on this case began September 24, 1973, and concluded on October 10, 1973. Shortly after the trial the Judge visited the Cambridge facility for a day.

HORACEK v. EXON, Civil No. CU 72-L-299 (D. Neb., filed Sept. 28, 1972)

This late 1972 class action complaint against Governor James J. Exon of Nebraska, the director of the state department of public institutions, the director of medical services, the director of the state office of mental retardation and the superintendent of the Beatrice State Home for the Mentally Retarded focuses on allegations that the residents of the state home ". . . are not receiving a constitutionally minimal level of 'habilitation,' a term which incorporates care, treatment, education, and training" and the exercise of constitutional rights including personal liberty.

The plaintiffs include five mentally retarded persons ranging in age from 13 to 26 and demonstrating borderline to severe mental retardation. These persons were residents in Beatrice from 1½ to 10 years and all regressed since their initial admission. It is alleged that none were provided with appropriate education and/or training programs during their residence at Beatrice. An additional plaintiff is the Nebraska Association for Retarded Children.

The numerous allegations presented in the complaint include the following:

1. The approximately 1,400 residents of the Beatrice facility are all capable of benefiting from habilitation, yet have been denied from receiving same by the defendants.

2. Although a basis for the provision of habilitation services, individual treatment plans have not been developed for any residents.

3. "The environment at Beatrice is inhumane and psychologically destructive." Substantive charges listed include old, hazardous, and inadequately cooled and ventilated housing, lack of privacy, inadequate toilet and hygenic equipment and facilities, overcrowding, restrictive mail and telephone policies, improper clothing, inadequate diet and food preparation procedures, and finally the lack of sufficient therapy, education, or vocational training opportunities for the residents.

4. A shortage of all types of staff and the presence of many untrained staff, particularly direct-care personnel.

5. The absence of evaluation and review procedures to determine resident status and program needs.

6. Each Beatrice resident ". . . could be more adequately habilitated in alternatives less drastic than the conditions now existing at Beatrice." In this regard it is asserted that the defendants have failed to discharge residents who could live in less restrictive environments and also failed to plan and develop sufficient community facilities to meet this need.

7. Numerous violations of the equal protection clause of the fourteenth amendment including the unreasonable, arbitrary, and capricious classification of some residents as mentally retarded, the denial of equal education opportunities provided to children in the community, the expenditure of greater funds for the hospitalized mentally ill and the maintenance of standards in the institution that are "markedly inferior" to community programs.

8. Many residents are required to engage in non-therapeutic work for token or no compensation thus violating constitutional provisions that prohibit enforced labor except as punishment for criminal acts.

9. The use of solitary confinement, strait-jackets and other restrictive devices and practices constitutes unlawfully cruel and unusual punishment.

The following relief is sought:

1. The action is to be classified as a class action.

2. The violations alleged are constitutional rights and are present rights which must immediately be respected.

3. A judgment indicating Beatrice does not provide constitutionally minimum standards of care and that the court will specify such minimum standards.

4. An injunction requiring the rectification of all unconstitutional conditions, policies, and practices.

5. A restriction preventing the defendants from building any non-community based facilities until the court determines that such programs are sufficiently available.

6. Enjoin defendants from admitting any more residents to Beatrice until minimum standards are met as determined by the court.

7. Require the provision of sufficient additional habilitation services to compensate for the regression and deterioration the Beatrice residents have suffered.

8. A judgment ". . . declaring that the community service programs are the constitutionally required least restrictive alternative for the habilitation of the mentally retarded in Nebraska."

9. A master be appointed.

10. The court retain continuing jurisdiction.

11. Plaintiff's attorneys' fees and the costs of the action.

A motion to dismiss the suit patterned after *Burnham* was filed by the defendants but was denied on March 23, 1973. In its memorandum denying the motion to dismiss the court said:

"The allegations that the conditions of confinement at the Beatrice State Hospital are violative of the Eighth Amendment's ban on cruel and unusual punishment would appear to fall within the purview of the civil rights act. It must be noted that the ban on cruel and unusual punishment applies not only to sentences imposed as judicial proceedings, but to conditions of confinement as well."

In the same order the Judge allowed the National Center for Law and the Handicapped to enter the case as amicus curiae (friend of the court.)

Trial is now scheduled for early winter, 1974.

PLACEMENT

LARRY P. v. RILES, Civil No. C-71-2270 343 F. Supp. 1306 (N.D. Cal., 1972)

This class action suit was filed in late November, 1971, on behalf of the six named black, elementary school aged children attending classes in the San Francisco Unified School District. It is alleged that they have been inappropriately classified as educable mentally retarded and placed and retained in classes for such children. The complaint argued that the children were not mentally retarded, but rather "the victims of a testing procedure which fails to recognize their unfamiliarity with the white middle class cultural background and which ignores the learning experiences which they may have had in their homes." The defendants include state and local school officials and board members.

It is alleged that misplacement in classes for the mentally retarded carries a stigma and "a life sentence of illiteracy." Statistical information indicated that in the San Francisco Unified School District, as well as the state, a disproportionate number of black children are enrolled in programs for the retarded. It is further pointed out that even though code and regulatory procedures regarding identification, classification, and placement of the mentally retarded were changed to be more effective, inadequacies in the processes still exist.

The plaintiffs asked the court to order the defendants to do the following:

1. Evaluate or assess plaintiffs and other black children by using group or individual ability or intelligence tests which properly account for the cultural background and experience of the children to whom such tests are administered;

2. Restrict the placement of the plaintiffs and other black children now in classes for the mentally retarded on the basis of results of culturally discriminatory tests and testing procedures;

3. Prevent the retention of plaintiffs and other black children now in classes for the mentally retarded unless the children are immediately re-evaluated and then annually retested by means which take into account cultural background;

4. Place plaintiffs into regular classrooms with children of comparable age and provide them with intensive and supplemental individual training thereby enabling plaintiffs and those similarly situated to achieve at the level of their peers as rapidly as possible;

5. Remove from the school records of these children any and all indications that they were/are mentally retarded or in a class for the mentally retarded and ensure that individual children not be identified by the results of individual or group I.Q. tests;

6. Take any action necessary to bring the distribution of black children in classes for the mentally retarded into close proximity with the distribution of blacks in the total population of the school districts;

7. Recruit and employ a sufficient number of black and other minority psychologists and psychometrists in local school districts, on the admission and planning committees of such districts, and as consultants to such districts so the tests will be interpreted by persons adequately prepared to consider the cultural background of the child. Further, the State Department of Education should be required in selecting and authorizing tests to be administered to school children throughout the state, to consider the extent to which the testing development companies utilized personnel with minority ethnic backgrounds and experiences in the development of culturally relevant tests;

8. "Declare pursuant to the Fourteenth Amendment to the United States Constitution, the Civil Rights Act of 1964, and the Elementary and Secondary Education Act and Regulations, that the current assignment of plaintiffs and other black students to California mentally retarded classes resulting in excessive segregation of such children into these classes is unlawful and unconstitutional and may not be justified by administration of the currently available I.Q. tests which fail to properly account for the cultural background and experience of black children."

On June 20, 1972, U.S. District Court Judge Robert Peckham of the Northern District of California issued an order and memorandum for a preliminary injunction requiring that ". . . no black student may [in the future] be placed in an EMR class on the basis of criteria which rely primarily on the results of I.Q. tests as they are currently administered if the consequence of use of such criteria is racial imbalance in the composition of EMR classes."

Judge Peckham in issuing this order determined that the incorrect placement of children in classes for the educable mentally retarded causes irreparable injury. Secondly, he pointed out that the I.Q. test as alleged by the plaintiffs is in fact culturally biased. Third, he discussed the statistical evidence gathered in San Francisco and the state of California that demonstrates that if the assumption is made that intelligence is randomly distributed, then children requiring EMR programs should be proportionately representative of all races. Yet the statistical data indicates that many more black than white children are classified educable mentally retarded and subsequently placed in special programs.

Because this pattern suggests the "suspect classification" of black children as an identifiable class, the judge felt that the burden of demonstrating that the use of the IQ test is not discriminatory falls to the school district. The San Francisco school district while not contesting the alleged bias of standardized IQ tests did point out that ". . . the tests are not the cause of the racial imbalance in EMR classes, or that the tests, although racially biased, are rationally related to the purpose for which they are used because they are the best means of classification currently available." The court concluded that the school district did not effectively demonstrate ". . . that I.Q. tests are rationally related to the purpose of segregating students according to their ability to learn in regular classes, at least insofar as those tests are applied to black students."

The court also commented that although California law and regulations regarding the classification of children as educable mentally retarded require the collection of extensive information, it is the I.Q. score which is given the most weight in final decision-making. Finally, the judge indicated that this use of the I.Q. score deprived black children of their right of equal protection of the laws.

In granting the preliminary injunction Judge Peckham stated that "the Court is now inclined to grant any of the specific forms of relief which plaintiffs seek." He required that black children currently enrolled in EMR programs must stay there ". . . but their yearly re-evaluations must be conducted by means which do not deprive them of equal protection of the laws." Similarly, no action is required to compensate black students who were wrongfully placed at some time in the past.

GUADALUPE ORGANIZATION, INC. v. TEMPE ELEMENTARY SCHOOL DISTRICT, Civil No. 71-435

This Arizona case was brought by the Guadalupe Organization, Inc. regarding the disproportionate number of bilingual children enrolled in classes for the mentally handicapped. The action which has now been stipulated provides for the following:

1. Re-evaluation of children assigned to the Tempe special education program for the mentally retarded to determine if any bilingual children had been incorrectly assigned to such placements.

2. Prior to the assignment of a bilingual child to the program for the mentally retarded, the child must be retested in his primary language and have his personal history and environment examined by an appropriate "professional advisor," such as a psychologist or social worker.

3. The records of children found to be incorrectly assigned to the programs must be corrected.

4. All communications from the school to the family of a bilingual child must be in the family's primary language and must include information about the success of the special education program and notice of their right to withdraw their child from it.

STEWART v. PHILIPS, Civil No. 70-1199-F (D. Mass., filed Sept. 14, 1970)

In this 1970 class action seven poor children placed in Boston public special school classes for the mentally retarded contest the manner in which they were classified and placed in those programs. The children range in age from eight to 12 and have spent from one to six years in special class programs for the mentally retarded. The named plaintiffs are subdivided into three groups as follows:

Group I – Poor or black Boston children who are not mentally retarded and ". . . have been, are, or may be denied the right to a regular public school education in a regular class by being misclassified mentally retarded."

Group II – Poor or black Boston children who are not mentally retarded and ". . . have been, are, or may be denied the right to be assigned to an educational program created for their special education needs [under applicable state statute] by being misclassified mentally retarded."

Group III – "All parents of students who have been, are, or may be placed in a special class placement, an opportunity to review test scores or the reasons for special class placement, or an opportunity to participate in any meaningful or understanding way in the decision to place the student in a 'special' class."

The defendants include the members of the Boston School Committee (board), the superintendent and his assistants, the director of the department of testing and measurements, director of special education, two state education officials, and the state commissioner of mental health.

It is alleged in the complaint that the Group I plaintiffs have simply been misclassified and placed in classes for the mentally retarded while the Group II plaintiffs have been misclassified as mentally retarded and incorrectly placed in special classes for the mentally retarded while in fact they were in need of special programs but for the remediation of handicaps other then mental retardation. It is further alleged that the plaintiff children were so placed because they were perceived as behavior problems.

Specific allegations regarding the misclassification are as follows:

1. The process of classification ". . . is based exclusively upon tests which discriminate against [plaintiffs] in that the tests are standardized on a population which is white and dissimilar to the [plaintiffs]."

2. The administration and interpretation of the tests by Boston school officials fail ". . . to distinguish among a wide range of learning disabilities, only one of which may be mental retardation."

3. Classification and placement is made on the basis of a single test score standard and other necessary information is neither gathered nor considered.

4. Boston's "school psychologists" are unqualified to interpret the limited classification devices used in the Boston schools.

Further, the complaint alleges that children in "special classes" which are segregated from the regular class population receive a substantially different education than children retained in regular programs. Such placements, it is alleged results in ". . . substantial educational, psychological, and social harm . . ." which is cumulative. Thus, the longer children are incorrectly retained in special classes, the greater the damage. It is also indicated that even when such children are returned to the regular class they remain irreparably harmed because counterpart children will have continued to make academic progress while the former remained in the special class, educationally static. Reference is also made to the negative stigmatic affect upon the child himself and the educational community by the assigning of the label, mental retardation.

Assigning of the Group I plaintiffs to classes for the mentally retarded when they were not mentally retarded is arbitrary and irrational and ". . . deprives them of the right to equal protection of the laws in violation of the fourteenth amendment in that students who are similar to the Group I plaintiffs with respect to their educational potential are not placed in classes for the mentally retarded and are permitted to receive a regular education in a regular class." A similar allegation is made of the denial of equal protection of the laws on behalf of the Group II plaintiffs on the basis that similar children are not placed in classes specifically organized to meet their special education needs.

The final series of allegations concerns the Group III plaintiffs and in summary charges that in the process of classifying children mentally retarded and subsequently placing them in special classes the Boston city schools have deprived the plaintiffs of procedural due process as guaranteed by the fourteenth amendment.

The relief sought is as follows:

1. An award of $20,000 to each named plaintiff and members of the class for compensatory and punitive damages.

2. A permanent injunction specifying that children may neither be placed nor retained in a special class unless a Commission on Individual Educational Needs with members from state agencies, professional associations, the mayor of Boston, the chairman of the Boston school committee and two Boston parents is established to specify appropriate classification procedures, to monitor that tests are administered by qualified psychologists, to establish procedural safeguards for the classification and placement of children in special programs.

3. All children in special classes or on waiting lists be re-evaluated and reclassified and placed as necessary.

4. All children requiring reassignment shall be provided with transitional programs to serve specific individual needs.

5. No child may placed in special classes solely on the basis of an I.Q. score.

The state and city responded to the suit by seeking a dismissal on the grounds that no claim was presented. In addition the state also asserted that they were not proper parties to the action and that the plaintiffs did not exhaust available administrative remedies.

Plaintiffs' attorneys responded to the motion to dismiss on the basis of no claim by asserting the following:

1. "The arbitrary, irrational and discriminatory manner in which Boston public school students are classified mentally retarded denies them equal protection and due process of law."

2. "The failure to accord Boston public school students an opportunity to be heard prior to denying them the right to receive a regular education, by classifying them as mentally retarded, violates their right to procedural due process."

3. "The plaintiffs have no obligation to exhaust a state administrative remedy under the civil rights act when that remedy is in fact inadequate."

Over a year later defendants moved for summary judgment in their favor claiming that no genuine issue of fact existed. This motion was also denied. Another motion to dismiss was brought by the state defendants on the grounds of mootness, since the Department of Education and Mental Health had jointly issued new regulations providing for detailed evaluation before placement, the defendants claimed that no controversey remained. However, the court ruled that damages may still be obtained for past actions, and so the case has been continued pending a full trial.

RUIZ v. STATE BOARD OF EDUCATION, Civil No. 218294 (Sup. Ct. San Francisco County, Cal., filed Dec. 16, 1971).

The three children named in this December, 1971 class action are Mexican-Americans from Spanish speaking homes. They all have or will be administered group intelligence tests. It is alleged that the I.Q. scores obtained from these tests will be used to their detriment in the process of teaching, placing, and evaluating them in school.

The defendants are the state superintendent of public instruction and the members of the state board of education.

Such tests are required by state law to be administered to all sixth and twelfth grade students, the purpose is to obtain gross measures of public school effectiveness for the public, state agencies and the legislature. However, while individual scores are not reported to the state, they are, it is alleged, recorded in students' permanent records. It is alleged that these records influence teacher expectations of children's ability to learn, are utilized to place children in tracks or at specific academic levels, are used by school counselors as a basis to encourage participation in college preparatory or vocational programs, and are used by counselors to identify children for further evaluation for possible placement in classes for the mentally retarded.

The complaint contains documentation including personal views, professional opinion and scientific evidence that the IQ score by itself is an invalid predictor of educational attainment in non-middle class culture children. Further, the inadequacies of group test scores both from the view of the inadequacies of the testing environment itself and in the absence of background information about the child is discussed. It is further alleged that rather than predicting ability to learn, the tests only report what has been learned.

It is further alleged that when scores such as the group tests are attached to individual children such as the plaintiffs they will ". . . be irreparably harmed in that they will be denied their right to an education equal to that given all other students" which it is argued is a denial of equal protection of the law as guaranteed by the fourteenth amendment.

The final allegation is that the use of given gross IQ information by the state and legislature for planning and development is meaningless since the depressed scores are not truly indicative of the needs of districts with large minority-group populations. Decisions, for example, about the location of vocational programs based on this data would be faulty.

The relief sought by the plaintiffs includes:

1. An order preventing the placing of group intelligence tests scores in children's school records.

2. An injunction preventing the attaching of a score obtained from a group intelligence test with the child who obtained the score.

3. An injunction requiring the defendants to remove from all school records, IQ scores obtained from a group intelligence test.

4. An injunction preventing the use of group intelligence tests for the purpose of determining aggregrate or individual ability for the purpose of allocating funds.

This action is presently in process.

WALTON v. BOARD OF EDUCATION CITY SCHOOL DISTRICT OF GLEN COVE, 68 Misc. 2d 935, 328 N.Y.S. 2d 932 (1972).

Lynn Walton is 15 years old and up until November 5, 1971 was in regular attendance at Glen Cove City High School. On that date Lynn was suspended from school for 5 days, the maximum period of time for a suspension without convening a hearing. The reason for Lynn's suspension was for "verbally abusing a teacher and refusing to follow her directions." It is alleged in the petition that school authorities informed the petitioner (Lynn Walton's mother) that at the conclusion of the suspension period, Lynn would not be readmitted to school ". . . but would be placed on home tutoring pending transfer to the board of cooperative educational services (BOCES) school for the emotionally disturbed."

The respondents are the town board of education, the superintendent of schools, and the principal of Glen Cove High School.

It is specifically alleged that the respondents deprived Lynn of her right to receive an education equal to that of her peers at the regular high school without due process of law as guaranteed by the fourteenth amendment. It is further alleged that the suspension was continued in excess of five days by labeling Lynn as "handicapped" or "emotionally disturbed" pending her assignment to the BOCES school. It is argued that the assignment of the labels "handicapped" or "emotionally disturbed" ". . . was improperly, arbitrarily, and capriciously made, not on the basis of the infant's educational needs, but to justify her permanent exclusion from her regular school without procedural due process." Finally, it is alleged that the assignment of labels results in Lynn Walton being stigmatized and inferior and unfit.

Relief sought includes:

1. Annulling the suspension from regular school attendance.

2. Annulling the misclassification of Lynn and assignment of the labels "handicapped" or "emotionally disturbed."

3. Annulling the transfer of Lynn to the BOCES school.

In the ensuing memorandum of law and answer, an issue receiving attention was whether the reassignment of Lynn Walton from her regular high school to home instruction and ultimately to the school for the emotionally disturbed was simply an educational reassignment thus not requiring procedural due process. The petitioner asserts that "it is now well settled that the standards of due process may not be avoided by the simple label which a party chooses to fasten upon its conduct." The respondent answered that the classification and recommendations ". . . was made according to good and proper and lawful educational practice and policy."

On December 3, 1971, the court issued a show cause order to the respondents. On February 4, 1972, the court granted the relief sought by the petitioner recognizing the school district's violation of procedural due process. On February 28, 1972, a motion by the respondents for vacating the February 4 judgment was denied.

DIANA v. STATE BOARD OF EDUCATION, Civil No. C-70 37 RFP (N.D. Cal. Jan. 7, 1970 and June 18, 1973)

The plaintiffs in this early class action classification suit were nine Mexican-American school children representing two classes: (a) bilingual Mexican-American children placed in California classes for the mentally retarded; and (b) other young and preschool bilingual Mexican-American children who will be given IQ tests which "will inevitably lead to their placement in a class for mentally retarded."

At the outset it is argued that the plaintiff children are not mentally retarded and that the use of highly verbal, culturally biased, improperly standardized (norming population did not include rural Mexican-American children) IQ tests result in segregation of California's Mexican-American school age children into classes for the mentally retarded. To support their allegation, plaintiffs reported that during the 1966-67 school year, a California study revealed that 26% of the children in EMR classes were of Spanish surname while similarly named students comprised only 13% of the total student population.

Defendants in this action were the State Superintendent for Public Instruction, State Board of Education, Comptroller of the State, State Treasurer, and the Superintendent and Trustees of the Soledad Elementary School District.

Other supporting data presented were the results of retesting the plaintiff children in English and/or Spanish which revealed that seven of the nine children scored higher that the maximum score used by the local county schools as the ceiling (70 IQ for placement in programs

for the educable mentally retarded). One of the other two scored exactly 70 and the ninth student was three points below. The average gain was 15 points. This data was contrasted with the original results obtained when the children were tested in English by a non-Spanish speaking examiner and achieved a mean of 63.5 and a range from 30-72.

One further argument presented by plaintiffs is that by remaining in an inappropriate educational assignment, the plaintiff children "fall academically further and further behind their peers" and suffer irreparable injury.

In their complaint the plaintiffs requested the court to issue temporary restraining orders, preliminary and permanent injunction, and to declare, pursuant to the Fourteenth Amendment to the United States Constitution, the Civil Rights Act of 1964, and the Elementary and Secondary Education Act and Regulations that the assignment of Mexican-American students to classes for the mentally retarded resulting in excessive segregation of these children to be unlawful and unconstitutional.

On February 3, 1970, the Northern District Court of California adopted a stipulation and order that contained the following major points:

1. All children whose primary home language is other than English (Spanish, Chinese) must in the future be tested in both their primary language and in English.

2. Mexican-American and Chinese children already in classes for the mentally retarded must be retested in their primary language if this has not already been done and must be reevaluated only as to their achievement on non-verbal tests or sections of tests.

3. Each school district is required to submit to the state a summary of the retesting and re-evaluation and a plan listing special supplemental individual training to be provided to help each misplaced child re-enter regular school programs.

4. Form a new or revised IQ instrument to be used only with children of Mexican-American culture so that future testing will allow Mexican-American children to be compared to the performance of their peers, not the population as a whole.

5. Any school district having a significant disparity between the percentage of Mexican-American students in its regular classes and in its classes for the retarded must submit an explanation setting out the reasons for this disparity.

By mutual agreement of the parties, a period of two years was provided for defendants to comply with the court order. This was primarily due to the expected time needed to develop the new test. On October 31, 1972, however, plaintiffs returned to the court to indicate that defendants had failed to comply with the stipulation and order. On June 18, 1973, another stipulation was adopted by the court stating that although substantial progress was made in eliminating the excessive percentage of Mexican-American children in programs for the educable mentally retarded, the following major steps must occur:

1. The State Department of Education shall send letters to all districts that still present disparities requiring them to adopt a plan that "shall specify goals, including a timetable for reducing the disparity in each of the next three years, so that it is eliminated by September 1976."

2. School districts will annually submit reports to the State Department of Education that indicate the total number of children in educable mentally retarded classes by race and ethnic background.

3. When significant variance continues past 1976, "The State Department will cause a thorough audit of the district's program to be conducted, including the re-evaluation of pupils if necessary."

4. The court will review progress of the order between July 15, 1978 and September 1, 1978.